No. 11842

United States
Circuit Court of Appeals
For the Ninth Circuit

LOUIS RAPHAEL DE PRATU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

MR. CHARLES DAVIDSON,
Great Falls, Montana, and
MR. ARTHUR P. ACHER,
Helena, Montana,

Attorneys for Appellant and Defendant.

MR. JOHN B. TANSIL,
United States Attorney,
Billings, Montana,
MR. HARLOW PEASE,
Asst. United States Attorney,
Butte, Montana, and
MR. EMMETT C. ANGLAND,
Asst. United States Attorney,
Butte, Montana,

Attorneys for Appellee and Plaintiff.

In the District Court of the United States in and for the District of Montana

No. 6747

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS RAPHAEL DE PRATU,

Defendant.

Be It Remembered, that on February 18, 1947, an Indictment was duly returned and filed herein in the words and figures following, to wit: [2*]

INDICTMENT

The Grand Jury Charges:

Count One

(Falsely Claiming U. S. Citizenship.)
(8 USCA 746(a) 18)

On or about June 27, 1946, at Helena, in the District of Montana, and within the jurisdiction of this Court, the above-named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, in an application for a retail liquor license under the laws of the State of Montana filed by him with the Mon-

*Page numbering appearing at foot of page of original certified Transcript of Record.

tana Liquor Control Board, did state as follows: "Are you a citizen of the United States? A. Yes," whereas in truth and in fact the said defendant was not then and never had been a citizen of the United States, which he, the said defendant, well knew.

Count Two

(Falsely Claiming U. S. Citizenship.)
(8 USCA 746(a) 18)

On or about January 15, 1946, at Helena, in the District of Montana, and within the jurisdiction of this Court, the above-named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the [3] United States, in that the said defendant, in an application for a retail liquor license under the laws of the State of Montana filed by him with the Montana Liquor Control Board, did state as follows: "Are you a citizen of the United States? A. Yes," whereas in truth and in fact the said defendant was not then and never had been a citizen of the United States, which he, the said defendant, well knew.

Count Three

(Falsely Claiming U. S. Citizenship.)
(8 USCA 746(a) 18)

On or about September 11, 1946, at Sweetgrass, in the District of Montana, and within the jurisdiction of this Court, the above-named defendant, Louis Raphael De Pratu, did knowingly, falsely and felo-

niously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, before a board of special inquiry of the Immigration and Naturalization Service of the United States, having been first duly sworn as a witness, did wilfully and knowingly testify in part as follows: "Q. Of what country are you now a citizen? A. United States * * * I acquired United States citizenship through my father who naturalized in the United States while I was a minor," whereas in truth and in fact, the defendant was not then and never had been a citizen of the United States, as he, the said defendant then well knew.

A True Bill.

T. LOYE ASHTON,
Foreman.
JOHN B. TANSIL,
United States Attorney. [4]

[Endorsed]: Filed February 18, 1947.

Thereafter, on June 2, 1947, the defendant appeared in Court, was duly arraigned and entered his plea herein, the minute entry thereof being in the words and figures following, to wit:

[Title of District Court and Cause.]

PLEA

Defendant was duly called for arraignment and plea this day, said defendant being personally present in Court, and Mr. Emmett C. Angland, Assistant United States Attorney, being present and appearing for the United States.

Thereupon the defendant answered that his true name is Louis Raphael De Pratu, whereupon, on inquiry by the Court, the defendant stated that he has an attorney in Great Falls, Montana, and that he desires to plead at this time. Thereupon the indictment was read to the defendant, whereupon the defendant entered a plea of not guilty. Thereupon the Court stated that the trial of this cause will be had on a date to be later fixed by the Court.

Entered June 2, 1947.

H. H. WALKER,
Clerk. [6]

Thereafter, on January 5, 1948, the defendant filed a Motion for Bill of Particulars, and a Notice of calling up said Motion for hearing, being in the words and figures following, to wit: [7]

[Title of District Court and Cause.]

MOTION FOR BILL OF PARTICULARS

Comes now the defendant and respectfully moves the Court for an order for a Bill of Particulars as follows:

1. With respect to Count One of the Indictment specifying the particulars in which the matter of defendant's citizenship was involved, and particularly the fraudulent purpose of the representation, and such details as are necessary to show that the representations were made to a person or body having adequate reason for ascertaining defendant's citizenship.

2. With respect to Count Two of the Indictment specifying the particulars in which the matter of defendant's citizenship was involved, and particularly the fraudulent purpose of the representation, and such details as are necessary to show that the representations were made to a person or body having adequate reason for ascertaining defendant's citizenship.
3. With respect to Count Three of the Indictment specifying the particulars in which the matter of defendant's citizenship was involved, and particularly the fraudulent purpose of the representation, and such details as are necessary to show that the representations were made to a person or body having adequate reason for ascertaining defendant's citizenship.
4. With respect to Count Three of the Indictment a more particular statement of the status of the person or persons to whom [8] it is alleged that the representations were made.
5. With respect to each count of the indictment specifying whether or not the charge contemplated is the making of a false statement under oath, or the making of a false statement.

The defendant is entitled to this Bill of Particulars, for the reason that the generality of the Indictment prejudices the defendant in the preparation of his defense, and endangers his constitutional guaranty against double jeopardy.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 5, 1948. [9]

[Title of District Court and Cause.]

NOTICE RE BILL OF PARTICULARS

To the Plaintiff above named, and to John B. Tansil, Esq., United States Attorney for the District of Montana, Harlow Pease, Esq., Assistant United States Attorney for the District of Montana, and Emmett C. Angland, Esq., Assistant United States Attorney for the District of Montana, attorneys for plaintiff:

You and Each of You Will Please Take Notice: That the Defendant's motion for Bill of Particulars in the above-entitled cause will be called up for argument and submission on the 7th day of January, 1948, in the Federal courtroom at the post office building, City of Helena, Montana, at the hour of 10:00 o'clock a.m., or as soon as counsel can be heard.

Dated this 5th day of January, 1948.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

Service of the foregoing Notice together with a copy of the Motion in the above-entitled cause referred to in said Notice, acknowledged this 5th day of January, 1948.

HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff.

[Endorsed: Filed Jan. 5, 1948. [10]

Thereafter, on January 5, 1948, the defendant filed a Motion to Dismiss the Indictment herein, and a Notice of calling up said Motion for hearing, being in the words and figures following, to wit: [11]

[Title of District Court and Cause.]

MOTION TO DISMISS INDICTMENT

Comes now the defendant and moves the Court for an order dismissing the indictment on file herein, and alleges and avers:

1. That the first count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.
2. That the second count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.
3. That the third count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 5, 1948. [12]

[Title of District Court and Cause.]

NOTICE RE MOTION TO DISMISS

To the plaintiff above named, and to John B. Tansil, Esq., United States Attorney for the District of Montana, Harlow Pease, Esq., Assistant United States Attorney for the District of Montana, and Emmett C. Angland, Esq., Assistant United States Attorney for the District of Montana, attorneys for plaintiff:

You and Each of You Will Please Take Notice: That the motion to dismiss in the above-entitled cause will be called up for argument and submission on the 7th day of January, 1948, in the Federal courtroom at the post office building, City of Helena, Montana, at the hour of 10:00 o'clock a.m., or as soon as counsel can be heard.

Dated this 5th day of January, 1948.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

Service of the foregoing Notice together with a copy of the motion in the above-entitled cause referred to in said Notice, acknowledged this 5th day of January, 1948.

JOHN B. TANSIL,
HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 5, 1948. [13]

Thereafter, on January 7, 1948, the cause came on regularly for trial, the minute entry of the proceedings of the trial on said date being in the words and figures following, to wit:

[Title of District Court and Cause.]

TRIAL

This cause was duly called for trial this day, defendant being personally present in Court, with his attorneys, Mr. Charles Davidson and Mr. Arthur P. Acher, and Mr. Harlow Pease and Mr. Emmett C. Angland, Assistants to the United States Attorney, being present and appearing for the United States.

Thereupon the motions, heretofore filed by the defendant, to dismiss the indictment, for a bill of particulars and for an order of inspection, were called up for hearing at this time. Thereupon the motion to dismiss was argued by counsel and submitted, whereupon, after due consideration, Court ordered that said motion be and is denied. Thereupon Court ordered that the motions for a bill of particulars and for an order of inspection be and are denied as not timely made.

Thereupon the trial of the cause was proceeded with, and the following named persons were duly empaneled, accepted and sworn as a jury to try the cause, to wit:

E. J. Garrahan, George W. Nelson, Agnes E. Olson, John H. Luberts, George Leckner, Morris Sanford, Charles W. Tinker, Harry Rich-

ardson, Lillian F. Watson, Martin T. O'Connell, Arthur L. Johnson and J. R. Venable.

Thereupon Charles H. Reed was sworn and examined as a witness for the United States, and two certain applications for retail liquor licenses, marked as plaintiff's exhibits Nos. 1 and 2, were offered in evidence, to which offers the defendant objected, whereupon the offers were withdrawn by the plaintiff at this time.

Thereupon Paul W. Smith was sworn and examined as a witness for the United States, and plaintiff's exhibits Nos. 1 and 2 were reoffered in evidence, to which offers the defendant objected, the objection being by the Court overruled and said exhibits admitted in evidence. Thereupon a certain application for retail beer license, marked defendant's exhibit No. 3 was offered in evidence, to which offer the plaintiff objected and the objection being by the Court sustained.

Thereupon the jury was duly admonished by the Court and excused until 10:00 a.m. tomorrow, and further trial of the cause was ordered continued until that time.

Entered January 7, 1948.

H. H. WALKER,
Clerk. [14]

Thereafter, on January 8, 1948, the cause came on regularly for further trial, the minute entry of the proceedings of the trial on said date being in words and figures following, to wit:

[Title of District Court and Cause.]

TRIAL

Defendant and Counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Paul W. Smith was recalled and examined as a witness for the plaintiff, and a certain application for retail beer license was marked defendant's exhibit No. 4 for identification. Certain offers of proof, marked respectively, defendant's offers of proof Nos. 1, 2, 3, 4, and 5, were made by the defendant, to which offers the plaintiff objected and the objection as to each offer being by the Court sustained. Thereupon defendant offered in evidence his exhibit No. 4, heretofore marked for identification, to which offer the plaintiff objected and the objection being by the Court sustained. Thereupon a certified copy of Alien Registration Form and a certified copy of Non-existence of Naturalization Record, marked plaintiff's exhibits Nos. 5 and 6, respectively, were offered in evidence, to which offers the defendant objected, the objection as to each offer being by the Court overruled and said exhibits admitted in evidence.

Thereupon Frank S. Nooney and Arthur Matson were sworn and examined as witnesses for the United States, and certain portions of a document, marked as plaintiff's exhibit No. 7, were offered

in evidence, to which offer the defendant objected and the objection being by the Court sustained,

Thereupon the United States rested.

Thereupon the defendant moved the Court to strike certain testimony given by the witness Matson, for reasons stated in the record, which motion was by the Court denied. Thereupon defendant filed and presented to the Court a motion for judgment of acquittal herein, and also made an oral motion to order the entry of a judgment of acquittal for the reason that the evidence is insufficient to sustain a conviction under counts 1, 2 and 3 of the indictment. Thereupon the jury was excused from the courtroom, and in its absence the motions presented were argued by counsel, whereupon, after due consideration, Court ordered that said motions be and are denied.

Thereupon the jury was returned into Court and further trial of cause was proceeded with.

Thereupon Paul W. Smith was recalled and examined as a witness for the defendant, and that certain document marked defendant's exhibit No. 4, was reoffered in evidence, to which offer the plaintiff objected and the objection being by the Court sustained. Thereupon the defendant reoffered in evidence his exhibit No. 3, to which offer the plaintiff objected, the objection being by the Court overruled and said exhibit was admitted in evidence. Thereupon a certain offer of proof was made by the defendant, marked defendant's offer of proof No. 6, to which offer the plaintiff objected and the objection being by the Court sustained.

Thereupon Emma Lundby was sworn and examined as a witness for defendant, and a certified copy of the Charter of the Stockmens Club, marked defendant's exhibit No. 8, was offered and received in evidence over the objection of the plaintiff. A certified copy of the articles of incorporation of the Stockmens Club, marked defendant's exhibit No. 9, was offered in evidence by the defendant and objected to by the plaintiff, whereupon defendant withdrew his offer at this time. Certain entries contained in the minute book of the Stockmens Club were marked for identification as defendant's exhibits 10 to 18, both inclusive, and exhibits Nos. 10, 11, 12, 15, 17 and 18 were offered in evidence by the defendant. Thereupon plaintiff objected to the introduction in evidence of said exhibits, whereupon Court ordered that the objection as to exhibits Nos. 11 and 15 be sustained in part and overruled in part, and that the objection to exhibits Nos. 10, 12, 17 and 18 be sustained. [15]

Thereupon the jurors were duly admonished by the Court and excused until 10:00 a.m. tomorrow, and further trial of the cause was ordered continued until that time.

Entered January 8, 1948.

H. H. WALKER,
Clerk. [16]

Thereafter, on January 9, 1948, the cause came on regularly for further trial, the minute entry of the proceedings of the trial on said date being in words and figures following, to wit:

[Title of District Court and Cause.]

TRIAL

Defendant and counsel for respective parties, with the jury, present as before and trial of cause resumed.

Thereupon Emma Lundby was recalled and examined as a witness for the defendant, whereupon defendant rested and the evidence closed.

Thereupon defendant filed and presented to the Court a motion for judgment of acquittal, which motion was by the Court denied.

Thereupon, at the conclusion of all of the evidence, both parties having rested, Court announced its ruling on the instructions requested, heretofore presented to the Court, for specific charges to the jury, as follows: the Court refuses to give defendant's proposed instructions numbered 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 23, 24, 25 and 26, and the Court proposes to give defendant's proposed instructions numbered 3, 6, 17, 18, 22 and 7 as modified by the Court. Thereupon the defendant excepted to the Court's refusal to give his said proposed instructions above mentioned.

Thereupon, after the arguments of counsel and the instructions of the Court, to certain of which instructions the defendant excepted for reasons stated in the record, the following named persons were duly sworn as bailiffs for this case and for

all cases in which the jury may be given into their custody during the present term of this Court, to wit: Paul Erler, Edgar Taylor and Mary Shagina. Thereupon the jury retired in charge of sworn bailiffs to consider of its verdict, the Marshal being ordered and directed to furnish meals and lodging to the jurors and two bailiffs.

Thereupon, at 5:20 p.m., the jury returned into Court with its verdict, defendant and counsel for respective parties being present. Thereupon the verdict was duly received by the Court, ordered read and filed, and by the jury acknowledged to be its true verdict being as follows, to wit:

"(Title of Court and Cause)

"No. 6747—Verdict

"We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the indictment on file herein.

"MORRIS E. SANFORD,

"Foreman."

Thereupon, on motion of counsel for defendant, Court ordered that the jury be polled, whereupon as the jurors' names were called they each answered that the verdict as read is their true verdict.

Thereupon, on motion of counsel for defendant, Court ordered that the time for pronouncement of judgment herein be continued until 10:00 a.m. Monday, January 12, 1948.

Thereupon Court ordered that the defendant's bond herein be and is exonerated and that the defendant be remanded to the custody of the Marshal pending pronouncement of judgment. Thereupon, for good cause appearing, Court ordered that the defendant be admitted to bail in the sum of $7500.00, to be regularly approved by an authorized officer if a property bond, or in the sum of $5000.00 cash bail to be deposited with the Clerk of this Court, on condition that the defendant will appear here for sentence at 10:00 a.m. on Monday, January 12, 1948.

Entered January 9, 1948.

H. H. WALKER,
Clerk. [17]

Thereafter, on January 9, 1948, the verdict of the jury was duly returned and filed herein, being in the words and figures following, to wit. [18]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the Indictment on file herein.

MORRIS E. SANFORD,
Foreman.

[Endorsed]: Filed Jan. 9, 1948. [19]

Thereafter, on January 12, 1948, the Court rendered its Judgment herein, which Judgment was duly filed, entered and docketed, and being in the words and figures following, to wit: [20]

[Title of District Court and Cause.]

Criminal Indictment in three counts for violation of Title 8, Section 746(a) 18, U. S. C. A.

JUDGMENT AND COMMITMENT

On this 12th day of January, 1948, came Emmett C. Angland, Esq., Assistant United States Attorney for the District of Montana, and the defendant Louis Raphael De Pratu appearing in his proper person and represented by his counsel Charles Davidson, Esq., and Arthur P. Acher, Esq.,

And the defendant having been convicted on the 9th day of January, 1948, by a verdict of the jury, duly and regularly impaneled and sworn, of the offenses charged in Counts One, Two and Three of the indictment in the above entitled cause, to wit: In Count One that said defendant, on or about the 27th day of June, 1946, at Helena, Montana, and in Count Two that said defendant, on or about the 15th day of January, 1946, at Helena, Montana, and in Count Three that said defendant, on or about the 11th day of September, 1946, at Sweetgrass, Montana, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, whereas in truth and in fact

said defendant was not then and never had been a citizen of the United States, which he, the said defendant well knew.

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is By the Court Ordered and Adjudged that the said defendant Louis Raphael De Pratu, having been found guilty of the offense charged in Count One of the indictment, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of sixteen months, and that he be fined the sum of Five hundred and no/100 ($500.00) Dollars, and be imprisoned until payment of said fine, or until otherwise discharged according to law: and the said [21] defendant having been found guilty of the offense charged in Count Two of the indictment, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of sixteen months, and that he be fined the sum of Five hundred and no/100 ($500.00) Dollars, and be imprisoned until payment of said fine, or until otherwise discharged according to law; and the said defendant having been found guilty of the offense charged in Count Three of the indictment, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of sixteen months, and that he be fined

the sum of Five hundred and no/100 ($500.00) Dollars, and be imprisoned until payment of said fine, or until otherwise discharged according to law.

It Is By the Court Further Ordered and Adjudged that the sentences of imprisonment herein imposed on Count One, Count Two and Count Three of the indictment, run concurrently and not consecutively.

It Is Further Ordered that the Clerk of this court deliver a certified copy of this judgment and commitment to the United States Marshal, or other qualified officer, and the same shall serve as a commitment herein.

R. LEWIS BROWN,
United States District Judge.

[Endorsed]: Filed and Entered Jan. 12, 1948.

Thereafter, on January 13, 1948, the defendant filed a Notice of Appeal herein, being in the words and figures following, to wit: [23]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Louis Raphael De Pratu, Great Falls, Montana.

Name and address of appellant's attorneys: Charles Davidson, Great Falls, Montana, and Arthur P. Acher, Helena, Montana.

Offense: The first count of the indictment charges the defendant and appellant with falsely claiming

citizenship in violation of Section 746 (a) (18) Title 8 U. S. Code, in that the defendant on or about June 27th, 1946, did knowingly, falsely and feloniously represent himself to be a citizen without having been naturalized or admitted to citizenship and without otherwise being a citizen.

The second count charges a like offense alleged to have been committed on January 15th, 1946.

The third count charges that the defendant and appellant on or about September 11, 1946, knowingly, falsely, and feloniously represented himself to be a citizen before a Board of Special Inquiry of the Immigration and Naturalization Service of the United States after having been duly sworn as a witness, allegedly in violation of the same statutory provision. [24]

Concise statement of judgment or order, giving the date and any sentence:

Judgment of conviction dated January 12, 1948, ordered:

That the defendant be committed to the custody of the Attorney General to serve a term of sixteen (16) months, upon Count I of the indictment, and to pay a fine of $500.00 with imprisonment until said fine is paid, or said defendant is otherwise discharged according to law;

That the defendant be committed to the custody of the Attorney General to serve a term of sixteen (16) months, upon Count II of the indictment, and

to pay a fine of $500.00 with imprisonment until said fine is paid, or said defendant is otherwise discharged according to law;

That the defendant be committed to the custody of the Attorney General to serve a term of sixteen (16) months, upon Count III of the indictment, and to pay a fine of $500.00 with imprisonment until said fine is paid, or said defendant is otherwise discharged accordingly to law;

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated January 13th, 1948.

/s/ LOUIS RAPHAEL DE PRATU,
Appellant.
CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Appellant.

Service of the foregoing Notice of Appeal admitted and receipt of copy thereof acknowledged this 13th day of January, 1948.

HARLOW PEASE,
Assistant U. S. Attorney,
EMMETT C. ANGLAND,
Assistant U. S. Attorney,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Jan. 13, 1948. [25]

Thereafter, on January 13, 1948, an Order for Transmission of certain original exhibits was duly filed and entered herein, being in the words and figures following to wit: [26]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF EXHIBITS

Upon application of the defendant,

It Is Hereby Ordered, that the clerk of this Court be, and he is hereby, authorized to transmit to the United States Circuit Court of Appeals of the Ninth Circuit original exhibits 1, 2, 3, 4, 5, 6 and 7 introduced or offered at the trial of the above entitled cause as a part of the transcript of record.

Dated this 13th day of January, 1948.

R. LEWIS BROWN,
U. S. District Judge.

[Endorsed]: Filed and Entered Jan. 13, 1948.

Thereafter, on January 27, 1948, the Reporter's Transcript of the testimony and proceedings had at the trial of said cause, was duly filed herein, being in the words and figures following, to wit, and being Volume 2 of this transcript. [28]

In the District Court of the United States, District of Montana, Helena Division

No. 6747

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIS RAPHAEL DE PRATU,

Defendant.

REPORTER'S TRANSCRIPT

Before: Honorable R. Lewis Brown, sitting with a Jury at Helena, Montana, January 7th, 8th and 9th, 1948.

Appearances: Mr. Harlow Pease, Asst. U. S. Attorney, and Mr. Emmett C. Angland, Asst. U. S. Attorney, Attorneys for Plaintiff; Mr. Charles Davidson, and Mr. Arthur P. Acher, Attorneys for Defendant. [30]

Be It Remembered, that this cause came on regularly for trial before the Honorable R. Lewis Brown, Judge of the District Court of the United States, District of Montana, Helena Division, sitting with a jury, on the 7th, 8th, and 9th days of January, 1948, Messrs. Harlow Pease and Emmett C. Angland, Assistant United States Attorneys, appearing as attorneys for the plaintiff, and Messrs. Arthur P. Acher and Charles W. Davidson appearing as attorneys for the defendant.

Thereupon, the following proceedings were had:

The Court: United States versus Louis Raphael De Pratu. Is the Government ready for trial?

Mr. Davidson: May it please the Court, in this cause, No. 6747, United States against Louis Raphael De Pratu, we have noticed for hearing for this morning motion to dismiss the [33] indictment on file in this matter, motion for bill of particulars, and motion for an order of inspection. Notice of all three motions have been served on the United States Attorney. While the papers filed may seem somewhat voluminous, I am sure the information desired can be furnished without causing the District Attorney serious inconvenience and without any delay in the trial, while at the same time the rights of the defendant will be more adequately protected.

It is only since this cause has been set for trial that this counsel was definitely retained to represent the defendant. While I have represented Mr. De Pratu in a number of civil matters, I do not ordinarily engage in criminal practice, and suggested to him that he retain counsel in Helena. However, when the case was set for trial, he brought me the notice of the setting about December 22, 1947, and insisted that I represent him and I immediately prepared and sent to Butte a motion for transfer of the case for trial from the Helena Division to the Great Falls Division which was denied on December 26, 1947. Immediately thereafter I was required to be out of the state, leaving on December 27th, and did not return to Montana until January 5,

1948. Prior to leaving the state, I had talked with Mr. Acher, attorney at law, at Helena, asking that he assist in the trial, but he did not agree at that time to help in the case. During my absence from the state, the defendant, Mr. De Pratu, talked with Mr. Acher, but it was not [34] until Saturday, January 3rd, that Mr. Acher was definitely retained to be associated with me in the case. As soon as I returned to Montana, I came to Helena and conferred with Mr. Acher and the motions which have been noticed this morning were immediately prepared, as were the notices of hearing. These were taken to Butte by me on Monday afternoon, January 5th, and served upon the United States Attorney.

We felt that this statement was due the Court to explain why these motions have not heretofore been made. Under Rule 12(b)(3), the motion to dismiss may be made after the plea is entered, and at this time we ask leave to make the motion to dismiss, although our arguments upon it will be exceedingly brief. If the Court wishes to hear argument, I would like to have Mr. Acher make our argument.

The Court: You proceed on that as you desire, Mr. Davidson. I will entertain a motion to dismiss, because, in my opinion, if the indictment does not state a public offense, the Court would have no jurisdiction, and the question of jurisdiction can be raised at any time, so I will hear the motion to dismiss.

* * * * * * *

Court: I am not going to listen to any arguments on the demand for a bill of particulars, and the demand is going to be denied, not being timely made. I don't intend to put the people of the United States to the expense of calling a jury into this court at the inconvenience of 70 citizens of the community, to come in here to present to me excuses that they have why they shall not be required to serve, to put the government to the expense of subpoenaing witnesses and bringing witnesses when the defendant in the case has had more than six months to do the things that he is doing now. This defendant was arraigned before me on the second of June, or about that time. He appeared without an attorney. Immediately upon seeing him here before me without an attorney, I interrogated him as to whether he did or did not have an attorney. He said he did have an attorney and didn't desire me to appoint an attorney. I explained to him the seriousness of the charge and asked him if he desired to go ahead with the plea and he did. I advised him at that time as to the setting of the case for trial at the next term of court, which under rule would be in [42] January, and he has had from that time until this time to know what he should do, and I think that I appreciated Mr. Davidson's statement to me that he and you both have just been called into the case, and I know, I have no doubt about that at all, but there is no one to blame. I don't know what happened to the attorney the defendant said he had. You are not to be blamed and no one else is to be blamed, but I don't intend to permit defendants to

trifle with the court in this manner. It may be that should I grant the motion now that has been made too late, it would or it might require a continuance of this case over the term, I don't know.

Mr. Acher: I think that the information which we require or request could be given by request on my part and answers in Court. The point is that we feel the government should specify by a bill of particulars if this indictment—(interrupted)

The Court: You may have been right and it may have been granted if timely made, but we operate under some kind of rules. There is a time and place for everything, and this defendant has had six months to make the demand he has made. I have been over here on several occasions holding law and motion days where this matter could have been presented to me and received my consideration, but to permit the defendant to sit idly by and do absolutely nothing to protect his own rights at all and then to come into Court on the eve of trial and after the jury is here and say that he will be prejudiced without [43] this information and lead the court to believe that all he desires is to escape trial at this term of court, expecting that something possibly might intervene between now and the next term of court and then he will not have to be tried. The defendant is entitled to a speedy trial under the constitution, and I intend to see that he gets it, and so are the people of the United States. They have some rights under the constitution, and one of the rights they have under the constitution is that if men have been guilty of serious public offenses, such as if they are convicted, they would probably

be sentenced to a penitentiary, that is the place they should be, and the people are entitled that they not be permitted to run loose and never be brought to the bar of justice. This is not in time to be made at all, and the only motion I am going to entertain is the motion to dismiss the indictment. That can be raised at any time. It might go to the jurisdiction of the Court, but as to the other motions, they are denied. [44]

* * * * * * *

(Whereupon, an adjournment was taken until 2:00 p.m., the same day, January 7, 1948, at which time the following proceedings were had:)

The Court: The Motion to Dismiss the indictment is denied. Draw a jury.

(Thereupon, after a jury was drawn and sworn, the following proceedings were had:)

TRANSCRIPT OF VOIR DIRE EXAMINATION OF THE TWELVE JURORS WHO SAT AS THE TRIAL JURY

After being duly sworn, the twelve jurors who sat as the trial jury in the above entitled case, testified as follows on their voir dire examination:

Examination of Mr. E. J. Garrahan

By Mr. Pease

Q. Mr. Garrahan, which is Mr. Garrahan. You may be seated, I just want to know which one I am asking. Where do you reside?

A. Livingston.

Q. What is your occupation?

A. Plumber.

Q. Have you ever heard of this case before now?

A. No, sir.

Q. Do you know the defendant?

A. No, sir.

Q. Do you know either Mr. Acher or Mr. Davidson, attorneys [236] for the defendant?

A. No.

Q. Have you ever come in contact with a case of this kind? By that I mean have you ever been a witness in such a case, or has any relative of yours been concerned in a case of this kind?

A. Not that I know of.

Q. Have you ever given particular attention to any news articles concerning a case of this kind?

A. I wouldn't say that I did.

Q. Is there anything in your mind which would place this kind of case in a different category or on a different basis from any other prosecution by the United States for an alleged violation of the laws of the United States? Is that clear or not?

A. No, not too clear.

Q. I will make it a little more simple. Can you sit as a juror in a case where this is the charge, that is, falsely claiming United States citizenship, and give it your thorough consideration without any prejudice or bias, just the same as if it were a charge of stealing government property or another federal offense? A. I would think so.

Q. There is nothing about the crime alleged here which places it subject to any prejudice on your part? [237] A. No.

Q. If selected on the jury, can you and will you try the case fairly and impartially? A. Yes.

Examination of Mr. George W. Nelson

By Mr. Pease

Q. Mr. Nelson, where do you live?

A. Deer Lodge.

Q. What is your occupation?

A. I am a rancher.

Q. Have you ever served on a jury before?

A. No.

Q. Either in state court or federal court?

A. No.

Q. Are you a man of family? A. Yes.

Q. Do you know the defendant in this case either personally, by reputation, by sight, or in any way?

A. No.

Q. Do you know his attorneys, Mr. Acher and Mr. Davidson, or either of them?

A. No, I don't.

Q. I will ask you if you have ever come in contact or ever given attention to a case in which a charge of this kind was made? [238]

A. No, I haven't.

Q. Is there anything about this case that puts it on a different basis from any other federal prosecution? A. No, there isn't.

Q. You don't have any personal views as to whether this is a good statute or not?

A. No, I haven't.

Q. You don't have any opinion as to the guilt or innocence of the defendant, or anything of that kind? A. No, sir.

Q. The indictment here, of course, is not evidence in the case, and should not give rise to any ideas or beliefs on the part of any member of the jury. I am asking you now as to whether you, if selected as a member of this jury, will be able to serve with complete impartiality, both to the government and to the defendant.

A. I believe I can.

Q. You don't know of anything in your mind at the present time which would work out to the disadvantage of either the government or the defendant? A. No.

Q. You will try the case on the law and the evidence? A. Yes. [239]

Examination of Mrs. Agnes E. Olson

By Mr. Pease

Q. Is it Mrs. Olson? Have you ever served on a jury before? A. No.

Q. Where do you live? A. East Helena.

Q. You are a housewife? A. Yes.

Q. What is your husband's occupation?

A. Smelter worker?

Q. Smelter worker? A. Yes.

Q. Well, you heard the explanation of the general nature of this case, Mrs. Olson, and I will ask you briefly if there is anything about the case which gives you any notions of it in advance of the hearing of evidence? A. No.

Q. You have never heard of the case before?

A. No.

Q. You don't know the defendant, I suppose?

A. No.

Q. Do you know Mr. Acher? A. No.

Q. Or Mr. Davidson? A. No.

Q. And there is nothing about the charge which I have described [240] here which gives you any prejudice or bias in regard to the case?

A. No.

Q. If you were selected as a member of the jury, you will try the case fairly and impartially?

A. Yes.

Examination of Mr. John Luberts

By Mr. Pease

Q. Mr. Luberts, where do you live?

A. Livingston.

Q. What is your occupation?

A. Carpenter.

Q. Have you ever served on either a state or federal jury? A. No, I haven't.

Q. This is your first experience being called on a jury? A. Yes.

Q. Have you ever heard of the case?

A. No.

Q. Read anything about it in the newspaper?

A. Just in the newspaper.

Q. Did you see something about it in the paper?

A. Yes.

Q. Did you form any opinion from what you read in the papers? A. No.

Q. Were any facts stated in the paper? [241]

A. No, it just mentioned the case.

Q. Did you gain—did there occur to you any feeling of bias or prejudice one way or the other as a result of reading the newspaper? A. No.

Q. You don't know the defendant, you said, I believe? A. No, I don't.

Q. Do you know his attorneys, either one of them? A. No.

Q. Have you ever given any attention to a charge of this kind in connection with any person whatever, anybody? A. No.

Q. A case of this kind never has come into your particular knowledge? A. No.

Q. Is there anything about the law making it a public offense to falsely claim United States citizenship which gives you any feeling one way or the other in a case of this kind? A. No.

Q. If you are selected on the jury here, can you and will you try the case fairly to both the government and the defendant? A. I think I will.

Examination of Mr. George Leckner

By Mr. Pease

Q. Mr. Leckner, where do you live? [242]

A. Boulder.

Q. What is your occupation?

A. Hotel and cafe operator.

Q. How long have you lived in Boulder?

A. Twelve years.

Q. Been in that business during that length of time? A. No, sir.

Q. What other occupation have you followed there?

A. I worked for the County there.

Q. Have you ever served on a jury?

A. Yes, sir.

Q. In what court? A. State court.

Q. Ever sit on a criminal case? A. No.

Q. Did you ever hear of this case before?

A. No, sir.

Q. Do you know Mr. Acher? A. No, sir.

Q. Or Mr. Davidson? A. No, sir.

Q. Did you ever read about this case?

A. No, sir.

Q. Did you ever hear about, read about, or be concerned with a similar case, that is, any case like this? [243] A. No, sir.

Q. Is there anything about that charge which gives the case to you any different color from any other federal prosecution? A. No, sir.

Q. You know, of course, the duties of a juror as to having an open mind in approaching a case?

A. Yes.

Q. I will ask you if your mind is free from any bias at this time? A. Yes, sir.

Q. Do you know the attorneys for defendant?

A. No, sir.

Q. If you are selected on the jury, you can and will give the government and the defendant a fair trial and abide by the instructions of the court?

A. Yes, sir.

Examination of Mr. Harry Richardson

By Mr. Pease

Q. Mr. Richardson, where do you live?

A. Clyde Park, Park County.

Q. What is your occupation? A. Farmer.

Q. Have you served on juries? A. Yes.

Q. State court or federal court, or both? [244]

A. Just in the County.

Q. Ever serve on a criminal case? A. One.

Q. You know, then, by experience, the duty of a juror to have an open mind? A. Yes.

Q. Is your mind open in this case?

A. Yes.

Q. Do you know anything about it at all, or have you any impressions concerning it, or concerning the Act of Congress which is the basis of the case?

A. No.

Q. Do you know the defendant? A. No.

Q. Do you know Mr. Acher or Mr. Davidson?

A. No.

Q. Can you and will you follow the instructions of the court and render a verdict in this case based solely upon the evidence and with all fairness and impartiality? A. Yes.

Examination of Mr. Morris Sanford

By Mr. Pease

Q. Mr. Sanford, where do you live?

A. Helena.

Q. What is your occupation? [245]

A. Insurance.

Q. You represent a state agency, do you?

A. I have my own local agency here in Helena.

Q. I see, and you are not what they call a general agent, then, I take it? A. No, I am not.

Q. Have you ever served on a jury?

A. In federal court, just federal court.

Q. You know then what the duties of a juror are, of course. Will you have any difficulty in this case, not by reason of any prejudice on your part, but by reason of any knowledge of any facts which would impress you? A. No.

Q. You don't know the defendant? A. No.

Q. Do you know his attorneys?

A. I know Mr. Acher.

Q. Is that an acquaintanceship of considerable standing?

A. No. I know him like I know attorneys in town, just know who they are.

Q. Have you in any piece of business worked with Mr. Acher? A. No.

Q. It is a social acquaintanceship then?

A. Just a speaking acquaintanceship.

Q. I see, no personal relationship or anything like that; and [246] as far as the type of the charge is concerned here, I take it you have no bias against the enforcement of this particular law any more than any other law of the United States?

A. No.

Q. And you will not be impressed or hindered in any way by the nature of the charge if you sit on this case? A. No.

Examination of Mr. Charles W. Tinker

By Mr. Pease

Q. Mr. Tinker, you reside where?

A. Livingston.

Q. What is your business? A. Salesman.

Q. With what concern are you associated?

A. Fuller Brushes.

Q. How long have you lived in Livingston?

A. A little over two years.

Q. Where did you live before that?

A. Sheridan, Wyoming.

Q. You have followed that profession of salesman for some years?

A. I have been with Fuller's only since September. I was with Montgomery Ward's before that.

Q. Have you ever served on a jury?

A. Yes. [247]

Q. Where? A. State.

Q. State of Montana?

A. In Livingston.

Q. Do you know the defendant in this case?

A. No, sir.

Q. Or his attorneys, either one of them?

A. No, sir.

Q. Do you know, or have you heard anything purporting to be any of the facts in this case?

A. No.

Q. You have no opinion on the merits of the case? A. No, sir.

Q. You have no bias or prejudice?

A. No, sir.

Q. You are in favor of the enforcement of all United States laws impartially? A. Yes.

Q. And if selected you will so act fairly and impartially? A. Yes, sir.

Examination of Mrs. Lillian F. Watson

By Mr. Angland

Q. Is that Mrs. Watson? A. Yes.

Q. Where do you reside? [248]

A. In Helena.

Q. Housewife, are you? A. Yes.

Q. What is the nature of your husband's employment?

A. Electric and steam engineer.

Q. For what concern?

A. Kessler Brewing Company.

Q. Mrs. Watson, have you ever been called as a juror? A. No.

Q. This is your first experience in being in court? A. That's right.

Q. Did you hear Mr. Pease's statement of the nature of this case, that is, the charge made by the grand jury against the defendant? Is there anything about the nature of this case that would cause you to be biased or prejudiced in any way, Mrs. Watson? A. No.

Q. You feel you can and will try the case involving this type of charge just as you would any other charge that might be made against an individual? A. Yes.

Q. Are you acquainted with Mr. Acher or Mr. Davidson? A. No.

Q. Are you acquainted with Mr. De Pratu?

A. No. [249]

Q. Mrs. Watson, the duties of a juror are, of course, explained to them by his Honor, and you will follow his directions and instructions to the jurors if you are chosen as a trial juror in this case, will you? A. Yes.

Q. And on the facts of the case you will be bound by the evidence presented to you in court, and that evidence presented in court only, is that right? A. That's right.

Q. And the law given to you by his Honor?

A. That's right.

Q. And you can and will follow the instructions and give the government fair and impartial treatment and give the defendant fair and impartial treatment? A. I will.

Examination of Martin T. O'Connell

By Mr. Angland

Q. Mr. O'Connell, where do you reside?

A. Bozeman.

Q. What is your occupation?

A. Laundryman.

Q. What was that?

A. I run a laundry.

Q. Have you lived in Bozeman for some period of time? A. All my life. [250]

Q. Mr. O'Connell, did you hear Mr. Pease's statement of the nature of the charge made against the defendant? A. Yes, sir.

Q. Is there anything about the nature of this case that would cause you to be biased or prejudiced in any way? A. No, sir.

Q. You can give the charge made under this act of Congress the same consideration you would give any other charge which might be made?

A. Yes, sir.

Q. Are you acquainted with the defendant, Mr. De Pratu? A. No, sir.

Q. Are you acquainted with either Mr. Davidson or Mr. Acher, his attorneys? A. No, sir.

Q. Have you ever sat on a jury before, Mr. O'Connell? A. No, sir.

Q. This is your first experience being called?

A. Yes, sir.

Q. You, of course, have some ideas of the duties of a juror? A. I do now.

Q. Since you have heard statements made in court. And you feel you could act as a fair and impartial trial juror if called in this case?

A. Yes, sir. [251]

Q. And can give the defendant a fair and impartial trial and the government a fair and impartial trial? A. Yes, sir.

Examination of Mr. Arthur L. Johnson

By Mr. Angland

Q. Mr. Johnson, where do you reside?

A. Machinist.

Q. Where do you reside?

A. What was that?

Q. Where do you live? A. Helena.

Q. You are a machinist by occupation?

A. Yes, sir.

Q. By whom are you employed?

A. Northern Pacific Railroad.

Q. How long have you lived in Helena, Mr. Johnson?

A. Off and on all my life, just 54 years. I have been away at times for short periods.

Q. Have you ever been called as a juror before this time? A. Once.

Q. Did you sit on a case at that time?

A. I was excused.

Q. You didn't sit on the trial of any case?

A. No, I didn't.

Q. You understand the duties of a juror will be explained to [252] you by his Honor?

A. Yes, sir.

Q. And your duties in this case particularly will be explained to you, and you will be bound by his instructions in that regard?

A. Sure, to the best of my ability.

Q. You heard Mr. Pease's statement concerning the charge made in this case?

A. No, due to his character of voice, his particular type of voice, I wouldn't say I understood half a dozen words he read or spoke.

Q. Did you hear the portion of the indictment that I read to Mr. Terry a moment ago?

A. Yes, I understood quite a lot of that what you read to the gentleman.

Q. You did hear that?

A. Quite a bit of it, yes.

Q. You don't think you heard it all?

A. No, I don't.

Q. Well, the charge made against the defendant in count one of the indictment is that on or about June 27, 1946, at Helena, Montana, the defendant did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship and without otherwise being a citizen of the United States in that the defendant, [253] in an application for a retail liquor license under the laws of the State of Montana, filed by him with the Montana Liquor Control Board stated as follows, quote

Are you a citizen of the United States, his answer, Yes, end of quote, whereas in truth and in fact the defendant was not then and never had been a citizen of the United States, which he, the said defendant, well knew. Now, the second count of the indictment is substantially the same, except that it is charged he committed that offense on January 15, 1946, the first count is on June 27th and the next one January 15, 1946, and the third count of the indictment charges that on or about—(interrupted)

The Court: No need reading it. The third count is exactly the same as the first two counts, except it is said that on September 11, 1946, he said he was a citizen of the United States in response to questions propounded to him by the Board of Inquiry of the Immigration and Naturalization Service of the United States. In other words, the charges are substantially the same, except in the first two counts the statement was made to state officials, and in the third count it was made to government officers. Proceed.

Q. Now, do you understand the nature of the charge made, Mr. Johnson? A. Yes, I do.

Q. Congress, of course, has provided by an Act, that if he did these things, he is guilty of an offense. Is there anything [254] about the nature of that charge that would cause you to be biased or prejudiced in any way? A. No, there isn't.

Q. You feel you could try this type of case fairly and impartially just as you might try any other case in which you might be called to act?

A. Yes, sir.

Q. Are you acquainted with the defendant, Mr. De Pratu? A. No, I am not.

Q. Are you acquainted with either of his attorneys, Mr. Acher or Mr. Davidson?

A. I have met Mr. Acher several years ago, ten years ago. I just had the pleasure of meeting him.

Q. Nothing you know of would prevent you from acting as a fair and impartial trial juror if you were chosen to sit in this case?

A. No, there isn't.

Examination of Mr. J. R. Venable

By Mr. Angland

Q. You reside in Livingston, Montana?

A. Yes, sir.

Q. What is your occupation?

A. Locomotive fireman, for the Northern Pacific Railroad.

Q. Have you ever heard anything about this case before you came into Court this morning, Mr. Venable? A. No, sir. [255]

Q. Did you hear the statement made by Mr. Pease? A. Yes, sir.

Q. You understand the nature of the charge made against the defendant? A. Yes, sir.

Q. Anything about the nature of the case that would cause you to be biased or prejudiced in any way? A. No, sir.

Q. You feel you could try the case fairly and impartially if you were chosen as a trial juror?

A. Yes.

Q. Are you acquainted with the defendant or Mr. Davidson or Mr. Acher, his attorneys?

A. No, sir.

Examination of George W. Nelson

By Mr. Acher

Q. Mr. Nelson, you understand that this is a criminal charge wherein the government must prove the guilt of the defendant beyond a reasonable doubt. Do you have any quarrel with that rule of law that provides that the burden is upon the government to establish the guilt of the defendant beyond a reasonable doubt? Does that sound like good law to you? A. Yes.

Q. In other words, in France, if the accusation is made the burden is upon the accused to acquit himself, but you understand we do not follow that system here in this country. The government must prove its case beyond a reasonable doubt?

A. Yes.

Q. Now, the Court will instruct you as to the law of the case [256] and you will be directed to take the law from the Court and not from what we lawyers may say. Do you think that is good law, that that should be the rule? A. Yes.

Q. The Court will also instruct you that you are the exclusive judges of the facts, what witnesses to believe, and where the truth lies in the case, and if the Court does so instruct you, you will have no hesitancy in following that instruction? In other words, in the state court, the instructions are given typed out and read to you, and they are abstract principles of law. In the federal court, his Honor instructs you orally, and he has the

right to comment on the evidence. However, he will also tell you that regardless of what he may say as to the facts, it is still your duty to decide the facts, and you will if you are so instructed, follow that law in spite of any comment the Court might make as to what he thought the facts were, would you not? A. Yes.

Q. His Honor will, no doubt instruct you that the defendant need not testify in his own behalf and that no adverse conclusion can be drawn from his failure to testify. It hasn't been decided whether he will or won't, but if defendant should not testify and the Court instructs you that you should not derive any unfavorable inference from that failure, you would have no hesitancy in following that instruction? [257] A. No.

Q. You can see the reasonableness and fairness of such instruction? A. Yes, sir.

Q. Now, in the case the charge is in the first two counts a trifle different than the third count. The first two counts say that in an application for a liquor license the defendant knowingly, falsely and feloniously represented himself to be a citizen, whereas he was not a citizen. Now, if the Court should instruct you that the word knowingly, as used in this charge, means with guilty knowledge, that is, deliberately and not something which is merely careless, negligent or inadvertent, you would have no hesitancy in following that instruction, would you? A. No.

Q. In other words, when the accusation says knowingly, that word is to be considered by you in

the proof to see whether or not, even though the statement were made, it comes within the definition of being deliberate and not something which is merely careless, negligent or inadvertent. The accusation says that the statement was made falsely, and if his Honor should instruct you that the word falsely, as used in this charge, means something more than an untruth, and means something perfidiously or treacherously, or with intent to defraud, you would have no hesitancy in following that instruction? [258]

A. I don't know.

Q. If the Court so instructed you, you would follow that instruction? A. Yes.

Q. In other words, if the Court says the word falsely, as used here means something more than not being true, it means something perfidious, or treacherous, or with intent to defraud, and those elements were present in the man's mind before he could be guilty, you could follow that instruction, could you not? A. If I was told, yes.

Q. And the government, in its charge, has said that that was done feloniously. Now, that word has a definite meaning, and if the Court should instruct you it means that the act was done with a mind bent on doing what is wrong, or, as has been said, with guilty mind, in other words, if the defendant did this thing feloniously with a guilty mind, you would follow that instruction and require the government to prove he had that state of mind before you find him guilty, is that correct? A. Yes.

Q. The Third count of the indictment is somewhat different than the first two. It charges that

the defendant, having been duly sworn before a Board of Inquiry of the Immigration and Naturalization Service of the United States, did wilfully and knowingly testify falsely that he was a citizen, whereas, he [259] wasn't a citizen. Now, if the Court should instruct you that the word "wilfully," as used in that charge, means that it must be an intentional act, and not something accidental or inadvertent, you would have no hesitancy in following such an instruction, would you, Mr. Nelson?

A. No.

Q. If the Court should instruct you that under the third count of the indictment there is a greater burden on the government to prove the charge than there is in the first two counts—(interrupted)

The Court: The Court will give no such instruction as that. There is only one burden on the government, and that is beyond a reasonable doubt. That is the burden in a criminal case, and you will understand, jurors, that in questions that counsel propounds to you if the Court instructs such and such, you will do this or that, you will not get any idea at all from that that I intend to so instruct you. There will be no instruction that there is any different burden of proof on the government under the third count than there is in the first one.

Mr. Acher: That there would be corroboration required is the point I wish to make.

The Court: There will be no charge given to the jury that there will be corroboration required any more on the third count than on the other two.

Mr. Acher: Very well. [260]

Q. I take it that neither Mr. Angland or Mr. Pease have ever represented you in any matter?

A. No.

Q. There is nothing in your mind that leads you to believe you could not give the defendant a fair and impartial trial if you were selected to act as a juror?

A. No, sir, I don't believe there is.

Examination of Mr. E. J. Garrahan

By Mr. Acher

Q. Mr. Garrahan, you have heard my interrogation of Mr. Nelson. You have no quarrel with the rule that the burden is on the government in this case to prove its case beyond a reasonable doubt, and you, if selected here, will require the government to prove the case against the defendant beyond a reasonable doubt before you would find against him, would you not? A. Yes.

Q. You understand that in a civil case, you have the right to decide the case for the side who has the greater weight of evidence on their side. In other words, if you put it on scales, whichever side weighs the most, you have the right to go their way, but you understand that isn't the rule in a criminal case, but in a criminal case the government must prove it beyond a reasonable doubt. A. Yes.

Q. Now, you understand what evidence is, and if his Honor [261] should instruct you that the indictment, the charge that has been filed, is no evidence against this man, but is merely a procedure

to get the case into Court, you would have no hesitancy in following that instruction, you could follow that instruction? In other words, you don't come into Court saying, "Well, they filed the charge against this man, he must be guilty." You don't have that feeling at all? A. No.

Q. You will leave your mind open and make the government prove the case beyond a reasonable doubt? A. That's right.

Q. Before you find against the defendant?

A. Yes.

Q. Have you any quarrel—assuming his Honor instructs you that even though the defendant made a statement as to his citizenship, it has to be made knowingly and has to be falsely made, and by knowingly, if the Court should instruct you that that meant with guilty knowledge and deliberately and not something which was merely careless, negligent or inadvertent, would you have any hesitancy in following that instruction? A. No.

Q. You could do so? A. Yes.

Q. And likewise, that if the word feloniously is used—the government charges that this statement was made feloniously—and [262] if the Court instructs you that this means made with a mind bent on doing what is wrong, something he did with a guilty mind, you would have no hesitancy in following that instruction? A. I don't think so.

Q. In other words, if some man made certain statements about his citizenship, but you concluded he didn't do it feloniously or falsely, as the Court

will define those terms, you would have no hesitancy in returning the verdict for the defendant?

A. That's right.

Q. Has either Mr. Peas or Mr. Angland ever acted as your attorney, these two gentlemen?

A. No, sir.

Q. Is there anything that you know or have heard that would lead you to believe you could not give the defendant a fair and impartial trial if you were selected?

A. I don't know of anything.

Examination of Mrs. Agnes E. Olson

By Mr. Acher

Q. Mrs. Olson, I don't believe I recall the District Attorney asking whether you had sat on a jury before. A. No.

Q. You did not? A. No.

Q. You are familiar, however, with the rule that in a criminal case the government must prove its case beyond a reasonable [263] doubt?

A. Yes, sir, I am.

Q. You have no quarrel with that principle of law, and you feel you could follow it without any holding back on your part? A. Yes.

Q. And that the defendant doesn't have to prove anything. He has the right to stand here and say nothing, but still you can draw no unfavorable inference from that fact, if he doesn't testify. If the Court so instructs you, you could still require the government to prove its case beyond a reasonable doubt? A. Yes.

Q. If the Court should instruct you that you are the sole and exclusive body that decides the facts, which witnesses to believe, where the truth is on the facts, you could follow that principle without any difficulty, could you not?

A. Yes, I think so.

Q. If the Court should tell you, as he will, that he is the sole judge of the law, and what he says is the law you must follow, you will do that, of course?

A. Yes.

Q. But, if the Court should, in the course of his statements with respect to the law, make certain observations as he has the right to do as to the facts, the mere fact that he is the judge will not let you say to yourself, "I will surrender up [264] part of my prerogative to him." You will still judge the case on the facts, as it is your duty to do, would you not? A. Yes.

Q. In this case it is charged that these statements were made falsely and feloniously and knowingly, and in the third count the word wilfully is used too. If the Court should instruct you that before the defendant can be guilty, you must find that he did these things—we will assume they were done as charged; we will just assume that the statement was made that the man was a citizen and he wasn't a citizen—but still if the Court instructs you you have to determine it was done falsely and that that meant something more than untrue, that it meant perfidiously or treacherously, or with intent to defraud, you would have no hesitancy in following that instruction, would you? A. No.

Q. Or that the word feloniously means with guilty mind and not something accidental, negligent or inadvertent, but something deliberate, a man making false statements when he knows what he is talking about. Are you acquainted with either Mr. Pease or Mr. Angland, the attorneys for the government? A. No.

Q. Is there anything you know about that I don't know about. Suppose you were representing Mr. De Pratu and I was sitting up there and had your state of mind—I don't know your state of [265] mind, you are the only one that does—assuming you were defendant's lawyer and I was up there with your state of mind, would you let me sit as a trial juror? A. Yes, I believe I would.

Examination of John H. Luberts

By Mr. Acher

Q. Mr. Luberts, you hadn't sat on a jury before?

A. No, I haven't.

Q. Can you follow without any hesitation the rule of law that the government must prove its case against this defendant beyond a reasonable doubt?

A. I can.

Q. You will require them to do that before you would find this man guilty. A. Yes.

Q. There is no feeling in your mind right at this moment that this man must be guilty of something or he wouldn't be here in court?

A. Not a bit.

Q. You understand the written charge is no evidence against him or any kind or character?

A. Yes.

Q. If the Court should instruct you that you are to take the law from the Court exclusively and not from what we lawyers say, you will have no hesitancy in following that instruction? [266]

A. No.

Q. If he also tells you that you are the sole and exclusive judge of the facts in the case, what witnesses to believe and where the truth lies on the facts, you will take the responsibility and do your job, would you not? A. I would.

Q. Even though the Court should make comments, which he has the right to do under the federal practice; he can tell you what he thinks the facts are, but you will still remember that while he, as a matter of law has the right to tell you what the law is, you still have the prerogative of deciding on the facts? A. Yes.

Q. In this case the charge is that these representations were made feloniously, falsely and knowingly, and you would have no hesitancy—or you will follow the instructions as to the significance of those words, and if his Honor should instruct you they mean it must be done deliberately and with guilty mind, and not something merely careless, or inadvertent, you would have no hesitancy in following such instruction, would you? A. No.

Q. Neither Mr. Pease nor Mr. Angland has ever acted as attorney for you? A. No.

Q. You know of no matter or thing which would prevent you from giving the defendant a fair and impartial trial? [267] A. There isn't.

Examination of George Leckner

By Mr. Acher

Q. Mr. Leckner, you will enter upon this case with an open mind, and won't consider the fact because the government has brought this charge there must be something to it. You have no opinion one way or the other at this time? A. No, sir.

Q. You will require the government to prove its case beyond a reasonable doubt? A. Yes.

Q. Now, you understand that the Court will instruct you as to the law, but in the course of his instructions he will tell you you are the sole and exclusive judges of the facts, that you will find them in the light of what he tells you the law is?

A. Yes, sir.

Q. You will do that, you will assume the responsibility which the government has placed in you if you are selected and you will decide the facts?

A. Yes, sir.

Q. And you will not let what the lawyers say or what the Judge says influence you as to your honest opinion on the facts, only, of course, subject to the rules of law that the Court will give you?

The Court: Just a minute. That is an improper question [268] coupling what the attorneys say with what the judge says. The judge speaks with more authority than the attorneys. I will charge you with reference to that at the end of the trial, but don't get any impression from counsel that the judge speaks with as little authority as attorneys do when making their argument.

Mr. Acher: I didn't mean that.

The Court: I don't know. That is what you said. I don't want to give that impression. The judge does speak with authority when he charges the jury.

Q. His Honor will instruct you as to the elements that go to make up the crime, the different things you must find from the evidence. The charge includes the words feloniously, falsely and knowingly, and his Honor will instruct you as to what those words mean, and before you can find him guilty, you will consider the facts in the light of the Court's instructions, will you not, without any hesitation on your part? A. Yes.

Examination of Morris Sanford

By Mr. Acher

Q. You have heretofore sat on juries in this Court? A. I have.

Q. What year.

A. About twice during the last 10 years.

Q. You have sat on criminal cases? [269]

A. I have.

Q. And, of course, you have heretofore heard instructions under which you would require the government to prove its case beyond a reasonable doubt before you would find for the government and against the defendant. A. I would.

Q. And you will consider carefully the instruction with respect to the elements that go to make up the crime, that these things, if done, were done falsely, feloniously and knowingly? A. Yes.

Q. And you would carefully analyze the evidence and apply it to those definitions if you were selected?

A. Yes.

Q. Has either Mr. Angland or Mr. Pease acted as your attorney? A. They have not.

Examination of Charles W. Tinker

By Mr. Acher

Q. Mr. Tinker, you stated you were on a jury in Livingston? A. Yes, sir.

Q. What year was that?

A. Last fall, 1947.

Q. What case were you on, do you recall?

A. Case of Louis Olson against State.

Q. That was one at Chadborn?

A. McDonald against State of Montana. [270]

Q. State against McDonald, do you mean?

A. Yes.

Q. And State against Olson? A. Yes, sir.

Q. And you won't require the defendant to prove anything; I mean you will always keep in mind that the government has the burden of proof in the case?

A. Yes, sir.

Q. You won't consider that the indictment or charge here is any evidence against this man?

A. No, sir.

Q. And you will, after you have been advised by the Court as to the elements that go to make up this crime, that is, the representation as to citizenship must have been made knowingly, feloniously and falsely; you will consider the definition of those words carefully in determining whether the defendant committed the crime, will you not?

A. Yes, sir.

Q. Do you know of any matter of thing which would prevent you from trying this case fairly and impartially for the defendant? A. No, sir.

Examination of Harry Richardson

By Mr. Acher

Q. Mr. Richardson, you were on the jury last fall, too, at Livingston? [271] A. No.

Q. What year were you?

A. It has been 20 years ago.

Q. How long? A. Twenty years or more.

Q. If you are selected, you will require the government to prove its case here beyond a reasonable doubt? A. Yes, sir.

Q. You don't consider that the charge which has been filed is any evidence against the defendant?

A. No.

Q. And if you are selected, after you have taken the law from the Court as he will instruct you, you will apply the law to the facts to the best of your ability, will you not? A. Yes.

Q. And in considering this charge, if his Honor instructs you as to the elements that go to make up the offense, that is, in addition to the representation that was made, "I am a citizen," and we will assume he wasn't a citizen, if his Honor instructs you this has to be done knowingly, falsely and feloniously, and defines those terms to you, you will consider those definitions carefully in determining whether or not the man committed a crime, will will you not? A. Yes, sir. [272]

Examination of Lillian F. Watson

By Mr. Acher

Q. I didn't hear your answer about your occupation or your husband's. A. Housewife.

Q. And your husband's?

A. Electric and steam engineer.

Q. Where is he employed?

A. Kessler Brewing Company.

Q. You heard my questions to these various jurors about our side of the case, have you not?

A. Yes, I did.

Q. Is there anything I suggested that raised a question in your mind that you couldn't be a fair and impartial juror? A. No.

Examination of Martin T. O'Connell

By Mr. Acher

Q. Mr. O'Connell, what is the name of your laundry? A. Gallatin Laundry.

Q. Is that a local institution or a chain concern?

A. It is local.

Q. Just local. You heard my questions to the various jurors here this afternoon, have you not?

A. Yes, sir.

Q. Is there any question I asked that raised a question in your mind so you would feel you couldn't give the defendant a [273] fair and impartial trial?

A. No, sir.

Examination of Arthur L. Johnson

By Mr. Acher

Q. If you are selected as a juror, you will require the Government to prove its case beyond a reasonable doubt before you will return a verdict against the defendant, will you not?

A. Yes, I would.

Q. Did you hear my questions to the various jurors here this afternoon?

A. Yes, I understood you quite thoroughly.

Q. Was there anything said in the course of my questions which crossed your mind which leads you to believe you wouldn't be qualified or couldn't give the defendant a fair trial if you were selected, anything that was said here? A. No.

Q. If you were selected, you would give the defendant a fair and impartial trial in this case?

A. Yes, sir, I would.

Examination of J. R. Venable

By Mr. Acher

Q. If selected as a juror, you would require the Government to prove its case beyond a reasonable doubt before you would return a verdict against this defendant, would you not? A. Yes, sir.

Q. You will listen carefully to the instructions given to you by the Court and endeavor to consider all the elements of the crime being charged, that the statements were made knowingly, falsely and

feloniously, and you will consider the Court's definition of those words to decide whether or not the man is guilty of the crime, will you not?

A. Yes, sir.

Q. You have never been represented by Mr. Pease or Mr. Angland in any legal matter?

A. No.

Q. You know of no reason why you shouldn't try the case fairly and impartially? A. No.

Thereafter, defendant waived his sixth and remaining peremptory challenges and the Government waived its fourth and remaining peremptory challenges. [275]

United States of America,
State of Montana—ss.

I, John J. Parker, Official Court Reporter in the District Court of the United States, District of Montana, Helena Division, do hereby certify that the foregoing annexed transcript is a true and correct transcript of the voir dire examination of the jurors who sat as the trial jury in Criminal Action No. 6747, United States of America, Plaintiff, vs. Louis Raphael De Pratu, Defendant, tried before the Honorable R. Lewis Brown sitting with a jury, in the Federal Building at Helena, Montana, on January 7th, 8th, 9th, 1948.

/s/ JOHN J. PARKER,
Official Court Reporter. [276]

The Court: Make your opening statement on behalf of the Government.

(Thereupon Mr. Pease made the opening statement for the Government.)

* * * * * * *

The Court: Do you desire to make your statement now?

Mr. Archer: Reserve it, if I could.

The Court: Very well. Call your first witness.

CHARLES H. REED

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pease.

Q. Please state your full name.

A. Charles H. Reed.

Q. Where is your residence? [50*]

A. In Helena now.

Q. And what official position do you hold with the State of Montana at this time?

A. I am acting administrator of the Montana Liquor Control Board.

Q. How long have you occupied the position of acting administrator?

A. Since the first of the year.

Q. That is, since the first day of January?

A. First day of January, that's right.

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* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

(Testimony of Charles H. Reed.)

Q. Of this present month? A. Yes, sir.

Q. Have you in your custody, in your official custody, the records of the Montana Liquor Control Board? A. Yes, sir.

Q. And those are located in the office of the Administrator, are they not? A. Yes, sir.

Q. In this city? A. Yes.

Q. Now, do you have among those records an application for a retail liquor license on behalf of the defendant in this case, Louis P. De Pratu?

A. Yes, sir, that was what I was supposed to bring.

Q. How many do you have? [51]

A. Two. May it be understood that I get those back?

Mr. Pease: The witness, your Honor, has asked that provision be made for the return of the exhibits after they have served their purpose. I presume there will be no question about that being done after the case is disposed of.

The Court: Well, of course, as far as that is concerned, the witness, as a state official, is not required to place state records out of his possession in any way, shape or form. If he desires to do it, it will be returned to him.

The Witness: They are the originals and only copy of those applications.

The Court: You are responsible for them as a state officer, and this Court's process will not require you to put these records out of your possession. If you desire to do it, they will be returned to you.

(Testimony of Charles H. Reed.)

Mr. Pease: If the Court please, we will be able to expeditiously furnish copies of the instruments, but we cannot furnish facsimilies of the signatures on them, which might possibly become of some moment, and I would like to have the privilege of using them here.

The Witness: I am willing to leave them here with you during the trial of the case.

The Court: Very well. Proceed.

Q. (By Mr. Pease): Mr. Reed, I would like to have you remove——(interrupted) [52]

Mr. Acher: One moment. To which we object on the ground that—I would like to ask a question or two to lay the foundation for this objection.

The Court: No. That is the Government's exhibit, and they have a perfect right to offer anything they want. If he wants to tear it apart, it is still in his possession and he can do anything he wants with it.

Mr. Pease: In view of the objection——(interrupted)

The Court: There isn't any objection before the Court at all. Proceed.

Q. (By Mr. Pease): Well, then, remove the beer license. Now, Mr. Reed, I show your plaintiff's Exhibit 1 and ask you if that is one of the permanent official files of the Montana Liquor Control Board? A. That is correct.

Q. Can you state the time or approximate time of its having been filed with the Liquor Control Board? A. The date is on here.

(Testimony of Charles H. Reed.)

Q. What is the date?

A. The 27th day of June, 1946.

Q. And I am handing you plaintiff's Exhibit 2, and ask you to state if that is one of the permanent official records of the Montana Liquor Control Board? A. Yes, sir.

Q. And can you state when that was filed? [53]

Mr. Acher: One moment, to which we object on the ground the witness has said he became head of this department on January 1 of this year, and I don't see how he would be qualified to give testimony as to when papers were filed before his tenure of office.

The Court: Well, the filing mark is on there, and that is what the witness is testifying from. He is not purporting to testify from his own personal knowledge. Just read the filing date if there is a filing date on it.

A. 15th day of January, 1946.

Q. What do your records show with reference to whether a license, a retail liquor license, was issued by the Board upon the application which is plaintiff's Exhibit 1 and upon the application which is Exhibit 2?

Mr. Acher: One moment. To which we object upon the ground that the records are the best evidence.

The Court: Yes, that is true. If they have a record as to whether it was issued or not, the record is the best evidence.

(Testimony of Charles H. Reed.)

Mr. Pease: My information is that the Board does not retain duplicates. Do you have a record as to whether or not a license was issued on this application?

A. Yes. We make them out in duplicate and we keep the duplicate. It is no doubt on file in the office.

Q. Do you have a record as to the issuance of a license?

The Court: He just said that he did have. He said that he has [54] a duplicate on file in his office, which constitutes the record, as I understand his answer.

Q. Calling your attention to the upper right-hand corner of the first page of plaintiff's Exhibit 1, I will ask you if that is one of the records with reference to the issuance of a liquor license?

A. Yes, sir, this is—in the file, the whole thing you mean?

Q. If, in the administration of your office, you make a notation in that box in the upper right-hand corner showing the number of the license issued?

A. That is correct.

Q. You say you do have a duplicate of that license in your office? A. Yes, sir.

Q. Is that also true of Exhibit 2?

A. Yes, sir, the same thing with that.

Mr. Pease: We offer in evidence plaintiff's Exhibits 1 and 2.

Mr. Acher: One moment. I should like to ask a question or two if I am permitted.

The Court: Proceed.

(Testimony of Charles H. Reed.)

Examination

By Mr. Acher:

Q. Showing you plaintiff's proposed Exhibit No. 2, you were asked the question as to when this document was filed, and you read January 15, 1946. Do you recall your testimony? [55]

A. I believe I did.

Q. Well if you will examine that, isn't it a fact that the date you read was the date that this is purportedly signed by someone, "Dated at Great Falls, Montana, this 15th day of January, 1946," isn't that correct? A. It seems to be.

Q. Isn't it a fact that there isn't a filing mark on this proposed Exhibit No. 2?

A. No, sir, I don't see it. May I explain about the date further on the records?

Q. I don't think it requires any explanation. When you brought plaintiff's proposed Exhibit No. 1 from your office, it was not in the same condition that it now is, in that there was annexed to it another paper, was there not?

A. Yes, the beer license.

Q. That was annexed as a part of your record?

A. Yes sir.

Q. Do you have that there? A. Yes, sir.

Q. And likewise, plaintiff's Exhibit 2 had annexed to it another paper which was fastened to it?

A. That's right.

Q. And it was that way in your office as an original record? A. Yes, sir.

(Testimony of Charles H. Reed.)

Mr. Acher: At this time we object to the introduction of [56] plaintiff's proposed Exhibits 1 and 2 upon the ground that there is no presumption that this document which bears a signature "L. P. De Pratu" was signed by the same person as the defendant here until such time as that matter has been connected up.

The Court: Let me see the exhibits. Well, what have you to say about that, Mr. Pease?

Mr. Pease: I wish to ask the witness one or two more questions, your Honor?

Direct Examination
(Resumed)

By Mr. Pease:

Q. What were you about to say, Mr. Reed, in answer to one of Mr. Acher's questions concerning the date?

The Court: Well, that is not proper because there is a date stamped on the face of this paper.

Mr. Pease: That's right.

The Court: It is stamped on the face of this paper, "Received January 28, 1946, Montana Liquor Control Board."

Mr. Acher: One has the stamp and the other does not.

The Court: One has the stamp and the other does not. That is plaintiff's Exhibit 1 that bears on its face the date of receipt by the Liquor Control Board. As to plaintiff's Exhibit 2 if there is anything on the exhibit that shows on its face it was

(Testimony of Charles H. Reed.)

received or filed by the Montana Liquor Control Board, he may read it. If there isn't, you may interrogate him as to what personal knowledge he has as to the date it was received.

Mr. Pease: He doesn't have any, your Honor, as to the date, [57] he wasn't there, but I would like to ask the witness if he can produce tomorrow the duplicate retail liquor license issued upon the application and upon each of these applications. Will you do so at the time Court convenes tomorrow morning, please?

The Witness: Yes.

Q. And do those show the date of issuance?

A. Yes, I presume they do.

Q. You are familiar with the form of license?

A. Yes, but I don't make the papers out myself.

The Court: Yes, but he has been administrator only since the first of the year. That isn't much time. He hasn't had much of an opportunity to become familiar with the forms of the Board. Well, there is an objection before the Court, Mr. Pease, what do you have to say about that?

Mr. Pease: Well I will withdraw the offer at this time until after the next witness is called, and I have no further questions of Mr. Reed at this time.

Mr. Acher: No cross-examination.

The Court: Very well, call your next witness.

(Witness excused.)

PAUL W. SMITH

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows: [58]

Direct Examination

By Mr. Pease:

Q. Please state your name.

A. Paul W. Smith.

Q. You are an attorney and counsellor by profession? A. I am.

Q. And have been for years? A. Yes.

Q. You live in Helena? A. I do.

Q. What, if any, official position do you now have with the State of Montana?

A. I am attorney for the Montana Liquor Control Board.

Q. How long a time have you been incumbent in that position?

A. I was employed as attorney in March, 1944.

Q. Have you occupied that position ever since?

A. I have.

Q. Were you such during the entire year of 1946? A. I was.

Q. I ask you to look at plaintiff's Exhibit 1 and plaintiff's Exhibit 2, particularly at the name of the applicant and the signature, and I will ask you did you have anything to do in your official capacity with the applications or with any licenses issued pursuant thereto? A. Yes, sir, I did.

Q. Do you know the defendant, Louis De Pratu?

A. Yes, sir, I do.

Q. Do you know who these applications were made by?

(Testimony of Paul W. Smith.)

A. By Mr. De Pratu, in the courtroom here.

Q. The defendant in this case? A. Yes.

Q. Were those signatures on the exhibits when they first came before the Montana Liquor Control Board? A. Yes, they were.

Q. Mr. Smith, can you state what is the procedure of showing or of making a record of the time of filing applications of this kind?

A. They are filed when the applications—the applications are filed when they are received by the Board.

Q. What record is made of the time of receipt?

A. Well, the mailing clerk is supposed to stamp the time of receipt. They do on some; I notice one here there is.

Q. You find on Exhibit 1 there is a reception stamp?

A. Yes, that is made by the mail clerk at the Board.

The Court: Are you sure it is Exhibit 1?

Mr. Pease: He looked at it.

Q. (By Mr. Pease): The other one does not bear a reception stamp? A. No.

Q. What record is there of the Board which will show the time of filing of that application? [60]

A. There is a record here of February 15, 1946, marked O.K. by J.A.B. J.A.B. is Mr J. A. Buley. He was the administrator. That was the time he okayed this application so that it was on file with the Board at that time.

(Testimony of Paul W. Smith.)

Q. It was already on file by the 15th of February of 1946? A. Yes.

Q. Is that correct? A. That's correct, yes.

Mr. Pease: We now re-offer the two exhibits, if the Court please. I believe we overcame the objection made.

Mr. Acher: At this time the only objection I have, your Honor, it appears from the evidence of the witness heretofore that this exhibit is not complete. In fact under the Montana laws you can't get a retail liquor license until you do have a beer license, and, therefore, we submit the whole application should be offered. We will withdraw the objection if that is done.

The Court: Well, I feel that the District Attorney, in presenting his case, may offer such part of the official record as it appears to him is material in the prosecution of his case. His indictment charges a liquor license, and that ordinarily doesn't contemplate—the retail liquor license does not ordinarily contemplate, as I believe in common parlance, beer, so your objection to the introduction of the exhibits is overruled. However, the District Attorney is directed to make available [61] to you the portions of the record that you assert was removed from the exhibit as finally offered for your inspection and the inspection of your client, so that if you feel there is any particular part of that material to your client's case, or this defendant's case,

(Testimony of Paul W. Smith.)

you may have an opportunity then to offer it. Proceed. You will do that Mr. Pease, you will make that available to the defendant.

Mr. Pease: I will ask Mr. Reed to bring those beer licenses back tomorrow, or make them available right now.

The Court: We won't interrupt the trial. Make them available after five o'clock.

Mr. Pease: The applications are admitted?

The Court: They are admitted in evidence. The objection is overruled and they are admitted in evidence.

(Plaintiff's Exhibit 1, being an application to the Montana Liquor Control Board for a Retail Liquor License by L. P. De Pratu, dated the 27th day of June, 1946, and Plaintiff's Exhibit 2, being an application to the Montana Liquor Control Board for a Retail Liquor License by L. P. De Pratu, dated the 15th day of January, 1946, were here received in evidence and read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk.)

Pltf's Ex 1 (Admitted)

Form 7-3 (M—4-46)

(County in which license is to be used)

FISCAL YEAR
1946
July 1, 1946 to June 30, 1947

(DO NOT USE THIS SPACE)
Cash Item No.
Beer License R. No. 1170
Liquor License R. No. 1

FEE $

Montana Liquor Control Board
HELENA, MONTANA

Application for Retail Liquor License

PERSONAL CHECKS WILL NOT BE ACCEPTED. REMITTANCES MUST BE BY BANK DRAFT, MONEY ORDER OR EXPRESS ORDER.

Application must be completely filled out and sworn to before a Notary Public or other person authorized to administer oaths. The statutory fee must accompany this application and will be returned if the license is denied. This Board has thirty days in which to consider this application and the applicant must refrain from possessing or selling intoxicating liquor until in possession of the license applied for. All applicants must have a beer license, and no license shall be effective until a permit shall have been first secured under the laws of the United States if such a permit is necessary or is required under such law. If any false statement is made in any part of this application, the applicant, or applicants, shall be deemed guilty of a misdemeanor and upon conviction thereof, the license, if issued, shall be revoked and the applicant subjected to the penalties provided by law.

L. P. LE PRATU
(Full names of all applicants for this license. Please print or type.)

THE STOCIA[illegible]
(Trade name which applicant, or applicants, intend to call such business.)

619 - 3d Street N. W. Great Falls, Mont.
(Location by street and number and city or town of the premises where the business is to be carried on under the license, if issued.)

TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Liquor License and under oath make the following statements and answer the following questions, to-wit:

(1) State in what capacity you make this application:
President & Manager
(State whether owner, partner, or if corporation, state your office, or in any other capacity.)

(2) If a partnership, or other joint venture, give the names of all interested parties.

(3) Are you over the age of twenty-one years? Yes

(4) Are you a citizen of the United States? Yes

(5) Have you been a citizen of the state of Montana for five years? Yes If corporation, has corporation been organized and doing business in Montana for five years? No

(6) Are you a keeper of a house of ill fame? No

(7) Have you ever been convicted of being the keeper of a house of ill fame? No

(8) Have you ever been convicted, either under the laws of the federal government or the state of Montana, of pandering or other crime or misdemeanor opposed to decency and morality? No

(9) Have you or any one employed by you ever been convicted for violation of any law or ordinance relative to sale of beer or liquor? No

(10) If you answered "yes" to the preceding question, state the particular offense, date, court and place of conviction:

(11) Has any license to sell liquor at retail, issued under the Act by virtue of which this license is applied for, issued to you, or in which you were interested as a partner or otherwise, ever been revoked? No

(12) Has the undersigned, under separate application, applied for, or been issued, a beer license under the laws of Montana for the calendar year for which this license is applied for? No

(13) Has any other liquor license been issued to you this fiscal year? No

(14) Are you interested in any other liquor license other than the one for which this application is made? No

(15) Are the premises for which such license is sought inside the boundaries of an incorporated city or town? Yes

(16) If the premises for which license is sought are not in a city or town, are the same within a distance of five (5) miles of a city or town with a population of two thousand (2,000) or more, measured in a straight line from the nearest entrance of such premises to the nearest boundary of such city?

(17) Are the premises above specified, for which the license is applied, on the same street or avenue and within 600 feet of a building occupied exclusively as a church, synagogue or other place of worship, or school (except a commercially operated school); the measurements to be taken in a straight line from the center of the nearest entrance of such school, church, synagogue or other place of worship to the center of the nearest entrance of the premises for which the license is applied? No

(18) If you have answered "yes" to the last preceding question, state whether the premises for which the license is applied are maintained as a bona fide hotel, restaurant, railway car, club or fraternal organization or society, or similar place of business, established and in actual operation for one year prior to March 5, 1937? No

(19) If the business to be licensed is outside of an incorporated city or town, what other businesses are operated by applicant or those interested or about to be interested in the business to be licensed, such as other bars, dance halls, tourist camps, rooming houses and places of like resort? .....

(20) That the Board or any member thereof, or its duly authorized representative, or any peace officer of this state shall have the right at any time, and is hereby given the authority to make an examination of the premises of the undersigned and to check the books, records and stock in trade of the undersigned and to take an inventory thereof and in the event any liquor is found which is being kept or held in violation of the law, he may immediately sieze and remove the same;

(21) That the undersigned, or his or her employee or employees, will not sell, deliver or give away, or cause or permit to be sold, delivered or given away, any liquor, beer or wine to any person under the age of 21 years, or to any intoxicated person or any person actually, apparently or obviously intoxicated, or to an habitual drunkard, or to any interdicted person; and,

(22) That if the undersigned is granted the license applied for, the undersigned will abide by all rules and regulations of the Board relating to beer or intoxicating liquor, and will not violate any law of the United States, or of the State of Montana, or any legal city ordinance relating to beer or intoxicating liquor, and will not knowingly permit any agent or employees so to do, it being the express understanding that violation of any rule or regulation of said Board, or of any law of the United States, or of the State of Montana, or of any city ordinance relating to beer or intoxicating liquor by the undersigned, or any of them, or by any agent or employee of the undersigned, shall be sufficient grounds for the revocation or suspension of the license herein applied for.

Dated at Great Falls, Montana, this 27th day of June, 1946.

L. P. DeBrato

(Signatures of All Applicants)

STATE OF MONTANA,
COUNTY OF Cascade } ss.

L. P. DE PRATO
(Names of All Applicants)

being first duly sworn, each for himself, or herself, deposes and says: that he, or she, has read the foregoing application and knows the contents thereof; and that the same is true to the knowledge of the deponent.

L. P. DeBrato

(Signatures of All Applicants)

Subscribed and sworn to before me this 27th day of June, 1946.

Wm Mourt

Notary Public for the State of Montana.

Residing at Great Falls, Montana.

My Commission expires 9/15/48

LICENSE FEES—

In cities over 10,000 population or within five miles thereof	$600.00
Less than 10,000 and more than 5,000 or within five miles thereof	450.00
Less than 5,000 and more than 2,000 or within five miles thereof	300.00
Less than 2,000	200.00

In determining the population the Board will be governed by the last census in effect at the time of the application

MAKE SEPARATE REMITTANCE FOR EACH APPLICATION

1,500—2-45.

Cascade
(County in which license is to be used.)

FEE $ 60.00

FISCAL YEAR
1945
July 1, 1945 to June 30, 1946

Montana Liquor Control Board
HELENA, MONTANA

(DO NOT USE THIS SPACE)
Cash Item No.
Beer License R. No. 1[illegible]
Liquor License R. No. 1098

Application for Retail Liquor License

Application must be completely filled out and sworn to before a Notary Public or other person authorized to administer oaths. The statutory fee must accompany this application and will be returned if the license is denied. This Board has thirty days in which to consider this application and the applicant must refrain from possessing or selling intoxicating liquor until in possession of the license applied for. All applicants must have a beer license, and no license shall be effective until a permit shall have been first secured under the laws of the United States if such a permit is necessary or is required under such law. If any false statement is made in any part of this application, the applicant, or applicants, shall be deemed guilty of a misdemeanor and upon conviction thereof, the license, if issued, shall be revoked and the applicant subjected to the penalties provided by law.

L. P. DePratu
(Full names of all applicants for this license. Please print or type.)

The Stockman's Club
(Trade name which applicant, or applicants, intend to call such business.)

619 - 2nd Street Northwest, Great Falls, Montana
(Location by street and number and city or town of the premises where the business is to be carried on under the license, if issued.)

TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Liquor License and under oath make the following statements and answer the following questions, to-wit:

(1) State in what capacity you make this application:
President and Manager
(State whether owner, partner, or if corporation, state your office, or in any other capacity.)

(2) If a partnership, or other joint venture, give the names of all interested parties. ---

(3) Are you over the age of twenty-one years? Yes

(4) Are you a citizen of the United States? Yes

(5) Have you been a citizen of the state of Montana for five years? Yes

(6) Are you a keeper of a house of ill fame? No

(7) Have you ever been convicted of being the keeper of a house of ill fame? No

(8) Have you ever been convicted, either under the laws of the federal government or the state of Montana, of pandering or other crime or misdemeanor opposed to decency and morality? No

(9) If you answered "yes" to the preceding question, state the particular offense, date, court and place of conviction: ---

(10) Has any license to sell liquor at retail, issued under the Act by virtue of which this license is applied for, issued to you, or in which you were interested as a partner or otherwise, ever been revoked? No

(11) Has the undersigned, under separate application, applied for, or been issued, a beer license under the laws of Montana for the calendar year for which this license is applied for? Yes

(12) Has any other liquor license been issued to you this fiscal year? No

(13) Are you interested in any other liquor license other than the one for which this application is made? No

(14) Are the premises for which such license is sought inside the boundaries of an incorporated city or town? Yes

(15) If the premises for which license is sought are not in a city or town, are the same within a distance of five (5) miles of a city or town with a population of two thousand (2,000) or more, measured in a straight line from the nearest entrance of such premises to the nearest boundary of such city?

(16) Are the premises above specified, for which the license is applied, on the same street or avenue and within 600 feet of a building occupied exclusively as a church, synagogue or other place of worship, or school (except a commercially operated school); the measurements to be taken in a straight line from the center of the nearest entrance of such school, church, synagogue or other place of worship to the center of the nearest entrance of the premises for which the license is applied? No

OK 2/15/46 [illegible]

(17) If you have answered "yes" to the last preceding question, state whether the premises for which the license is applied are maintained as a bona fide hotel, restaurant, railway car, club or fraternal organization or society, or similar place of business, established and in actual operation for one year prior to March 5, 1937?.....

(18) If the business to be licensed is outside of an incorporated city or town, what other businesses are operated by applicant or those interested or about to be interested in the business to be licensed, such as other bars, dance halls, tourist camps, rooming houses and places of like resort? .....

.....

(19) That the Board or any member thereof, or its duly authorized representative, or any peace officer of this state shall have the right at any time, and is hereby given the authority to make an examination of the premises of the undersigned and to check the books, records and stock in trade of the undersigned and to take an inventory thereof and in the event any liquor is found which is being kept or held in violation of the law, he may immediately sieze and remove the same;

(20) That the undersigned, or his or her employee or employees, will not sell, deliver or give away, or cause or permit to be sold, delivered or given away, any liquor, beer or wine to any person under the age of 21 years, or to any intoxicated person or any person actually, apparently or obviously intoxicated, or to an habitual drunkard, or to any interdicted person; and,

(21) That if the undersigned is granted the license applied for, the undersigned will abide by all rules and regulations of the Board relating to beer or intoxicating liquor, and will not violate any law of the United States, or of the State of Montana, or any legal city ordinance relating to beer or intoxicating liquor, and will not knowingly permit any agent or employees so to do, it being the express understanding that violation of any rule or regulation of said Board, or of any law of the United States, or of the State of Montana, or of any city ordinance relating to beer or intoxicating liquor by the undersigned, or any of them, or by any agent or employee of the undersigned, shall be sufficient grounds for the revocation or suspension of the license herein applied for.

Dated at Great Falls, Montana, this 15th day of January, 1946

L. P. DePratu

.....

.....

(Signatures of All Applicants)

STATE OF MONTANA, } ss.
COUNTY OF Cascade }

L. P. DePratu

(Names of All Applicants)

being first duly sworn, each for himself, or herself, deposes and says: that he, or she, has read the foregoing application and knows the contents thereof; and that the same is true to the knowledge of the deponent.

L. P. DePratu

.....

.....

(Signatures of All Applicants)

Subscribed and sworn to before me this 15th day of January, 1946

B. O'Neil

Notary Public for the State of Montana.

Residing at Great Falls, Montana.

My Commission expires Oct. 20, 1946

LICENSE FEES—

In cities over 10,000 population or within five miles thereof	$600.00
Less than 10,000 and more than 6,000 or within five miles thereof	450.00
Less than 6,000 and more than 2,000 or within five miles thereof	300.00
Less than 2,000	200.00

In determining the population the Board will be governed by the last census in effect at the time of the application.

(Testimony of Paul W. Smith.)

Mr. Pease: You may cross-examine.

Cross-Examination

By Mr. Acher:

Mr. Acher: If the Court please, I would like to call attention—I don't know whether I am permitted to discuss that—the first question Mr. Pease didn't read to you, "State in what capacity you make this application" and then there is a line with the words typed in "President and Manager," and under the line it says "State whether owner, partner, or if corporation, state your office, or in any other capacity."

Mr. Pease: I did read that in the first application, it is the same in both.

Mr. Acher: You did in the first, but in the second you omitted it.

Mr. Pease: I didn't repeat.

Q. (By Mr. Acher): You have some acquaintanceship with the original application and the second application, that is, Exhibit 1 and Exhibit 2, in this case, do you not? A. Yes.

Q. Now, isn't it a fact that before the liquor license, which is plaintiff's Exhibit 1, could be issued that there has to be issued a beer license, and that it was annexed as part of your file in your office?

A. That's correct.

Q. And you had to do with this particular application personally, so you know about it?

A. Yes, it was submitted to me because of the Stockman's Club.

(Testimony of Paul W. Smith.)

Q. I cannot now—could I ask Mr. Reed, inasmuch as Mr. Smith can identify it, to have it presented at this time?

The Court: If Mr. Reed has it in his possession, and you desire [63] to get it from him, you may take time to get it, if you want.

Q. Showing you the Government's Exhibit No. 1, could you identify now the particular paper here that would fit that. It was taken off here in the presence of the jury a little while ago.

A. Yes.

Q. Showing you an exhibit which has been identified as defendant's Exhibit 3, Mr. Smith, I will ask you whether or not that application for a retail beer license was issued simultaneously with and as a condition precedent to—I mean the application was considered simultaneously with plaintiff's Exhibit 1, and that any license issued under Exhibit 1 first had to have a license issued under this application?

Mr. Pease: I think I will object to that question, your Honor, in part as it is not the best evidence in the case, the best evidence being a record, and in the second place, he is really asking Mr. Smith as to what the law provides.

The Court: That is true. The statute of Montana provides that a retail liquor license shall not be issued unless a beer license has been issued.

The Witness: Yes.

The Court: If that is the law, why ask the witness?

(Testimony of Paul W. Smith.)

Mr. Acher: I offer defendant's Exhibit 3 as part of the same application, intermingled with it. They couldn't get one without the other; and they are all one application. [64]

Mr. Pease: I would like to ask a question as a foundation.

Examination

By Mr. Pease:

Q. Mr. Smith, the two exhibits, the retail liquor application and the beer application, were stapled together by a wire staple when produced here in court, were they not? A. Yes, that is correct.

Q. Will you state whether they are considered as a single instrument, or were they stapled for convenience?

A. It is done for convenience in the office so it will be on top, be together.

Q. Is the beer application considered a part of the liquor application?

A. No, except they have to have a beer license before they can get a liquor license.

Mr. Pease: I think I will object to it on the ground I think it is an encumbrance of the record and is shown to be no part of the retail liquor license application.

The Court: Let me see it.

Mr. Acher: I think here is Exhibit 1 that goes with it, your Honor.

The Court: Well, ladies and gentlemen of the jury, there is a question of law which is to be submitted to me now that will probably take some little time.

(Jury excused until 10:00 o'clock, January 8, 1947, and retired from the courtroom.) [65]

The Court: Well, on what theory do you believe this is material, Mr. Acher, defendant's Exhibit 3 admissible in evidence at this time?

Mr. Acher: It shows on its face, your Honor, that this application was not necessarily for the defendant, but for a corporation. I expect to supplement that by further evidence. I think I can tell your Honor our theory of this case is this: we expect to show that there was a corporation formed called the Stockman's Club; that this application was made, theoretically for the club so far as our client was concerned. They had a rule that a non-profit club had to be in existence for so long a time under the staute before that was allowable, and so a license was issued to the man individually, but as appears from the statements on plaintiff's Exhibit 1, it is a debatable question whether it means he was a citizen or whether the club is a citizen.

The Court: Isn't that a part of your defense, then?

Mr. Acher: I think, your Honor, when a document is introduced in evidence, I thought the rule was I could introduce the rest of it in evidence. My contention is that the two documents are one and I can introduce the rest of it.

The Court: That may be the rule, but they are two separate and distinct applications as I see it, neither one relating to the other, one an application for a retail liquor license, and the other an application for a beer license. They may have both [66]

been signed at the same time; they may both have been submitted to the State Board of Equalization at the same time but, in my opinion, that does not make them one instrument. It doesn't make two of them one instrument. They are two separate pieces of paper, they were separately executed; there are questions that are put in one that are not put in the other. The rule, very true, is that when a portion of a writing is offered in evidence, that then the other party has the right to offer the other portion.

Mr. Acher: That is my contention.

The Court: But this is more than one writing. These are two separate and distinct writings, and the rule, as I view the rule—you are offering here one an application for a retail beer license, and the other an application for retail liquor license.

Mr. Acher: Your Honor will note up in the corner of plaintiff's Exhibit 1, "Beer License Issued."

The Court: That's right, and on this I note here that on this application for retail beer license, the number is on there, and I note also that on the application for retail beer license that the liquor license number is on there, too, but that, in my opinion, does not make it one paper, document, or instrument. They are still, as I see it, two separate and distinct papers. In other words, he was applying for two of these things: he was applying to the State Board to be permitted to sell two different articles [67] in his place of business. He was re-

quired to have licenses to sell each of them. Now, beer, as I view it, isn't a liquor, it is beer, it is not at all the same——(interrupted)

Mr. Acher: But he couldn't get a liquor license without a beer license.

The Court: That may be very true. The State may require as a condition precedent to licensing a man to sell whiskey that he also be licensed to sell beer, but that still doesn't make beer whiskey or whiskey beer, and as I view it at this time, they are two different and distinct instruments. The indictment charges that he made a false statement in a retail liquor license, in his application for a retail liquor license. That is the matter before the jury, and it makes no difference, as I view it, if he made a false statement in a retail liquor license, whether he made a true statement in his application for a retail beer license, and that seems to me to be your contention. If that is your contention, it seems to me it is matter to prove in your case in chief if that is your defense as you say it is. I will sustain the objection to that offer.

Mr. Acher: I will take it it isn't with prejudice to the right to renew it later?

The Court: No. Sustained on the ground it is part of your case in chief, if you desire.

(Whereupon an adjournment was taken until Thursday, January 8, 1948, at 10:00 o'clock a.m., at which time the following proceedings were had in the presence of the jury.) [68]

PAUL W. SMITH

witness for the plaintiff, resumed the witness stand for

Further Cross-Examination

By Mr. Acher:

Q. At the conclusion of yesterday's session, Mr. Smith, you had identified a document as defendant's proposed Exhibit 3, which I believe you identified as having been submitted at the same time as plaintiff's Exhibit 1? A. Yes.

Q. I now show you a document which has been marked for identification as defendant's Exhibit 4, and ask you to identify that.

A. That is the application for retail beer license.

Q. And I will ask you whether or not that was submitted at the same time as the application for retail liquor license which is in evidence as plaintiff's Exhibit 2? A. Yes, it was.

Q. In your direct examination, Mr. Smith, you testified that—the question was asked, "I ask you to look at plaintiff's Exhibit 1 and plaintiff's Exhibit 2, particularly at the name of the applicant and the signature, and I will ask you did you have anything to do in your official capacity with the applications or with any license issued pursuant thereto," and your answer was "Yes, sir, I did." I will ask you, Mr. Smith, whether or not, is it not a fact that plaintiff's Exhibit 2 was referred to you in your official capacity shortly prior to February 16, 1946, by Mr. Buley, the administrator for the Montana Liquor Control [69] Board, for an

(Testimony of Paul W. Smith.)

opinion as to whether or not a license could be issued to the Stockman's Club?

Mr. Pease: If the Court please, the Government objects on the ground that the matter appears to be irrelevant to the issues of the cause.

The Court: Sustained.

Mr. Acher: Could we make a written offer of proof, your Honor?

The Court: Very well.

Defendant's Offer of Proof No. 1

The defense offers to prove by the witness on the stand that he would have answered the question to which objection has been made in the affirmative.

Mr. Pease: The Government objects to the offer of proof, first, on the ground that the matter is irrelevant, second, on the ground it is improper cross-examination and a part of the defendant's case in chief.

The Court: Well, the offer of proof will be filed as defendant's offer of proof No. 1 by the Clerk and the objection will be sustained.

Mr. Acher: If your Honor please, do I have the right to ask questions on this subject, or should I confine myself to written offers of proof? I don't want to be in contempt, I want to proceed properly.

The Court: If you desire to make a record, propound the questions [70] orally and see if the questions are objected to and whether or not they will be sustained on it and then make your offer of proof.

(Testimony of Paul W. Smith.)

Q. Showing you plaintiff's Exhibit 2—this may be repetition but I am afraid it is in the last question—state whether or not this exhibit was presented to you shortly prior to February 15, 1946?

A. Yes, it was.

Q. And what action did you take in your official capacity upon the application when it was submitted to you?

Mr. Pease: Just a moment, if the Court please, I would like an opportunity to ask a foundation question at this point.

The Court: Well, I don't know. A foundation for what?

Mr. Pease: I want to clarify the character of the official capacity, your Honor.

The Court: No. This is cross-examination. The witness has testified on your direct examination as to the authority of the position he held with the Montana Liquor Control Board.

Mr. Pease: I appreciate that. I will object to the question on the ground that the same is not proper cross-examination and part of the defense of the case, and the same is irrelevant to the issues of the case.

The Court: Well, I think I will overrule that one objection. It is not asking the witness to relate anything he said; it is simply asking him what he did. It will be overruled. Simply [71] answer the question.

A. I gave an opinion as to the Stockman's Club holding a liquor license..

(Testimony of Paul W. Smith.)

Q. And what was that opinion?

Mr. Pease: Objected to on the same grounds as the last objection.

The Court: Sustained.

Q. In giving that opinion, did you treat plaintiff's Exhibit 2 as an application by L. P. De Pratu or as an application by the Stockman's Club?

Mr. Pease: Object to that, if the Court please, on the ground stated in the last objection and also as calling for an opinion, apparently as calling for a matter which apparently is a matter of record, the record being the best evidence.

Mr. Acher: If the Court please, I would just like to call attention that this is cross-examination. On direct examination he was asked, "Did you have anything to do in your official capacity with the applications or with any licenses issued pursuant thereto?" He said, "Yes, sir." On cross, without objection, the question was, "You had to do with this particular application personally so you know about it?" and the answer was, "Yes, it was submitted to me because of the Stockman's Club." It is in without objection.

The Court: That is true. What goes in without objection on cross-examination, as I view it, doesn't enlarge the scope of [72] cross-examination. The scope of the cross-examination is either enlarged or limited by the questions asked by the counsel on his direct examination, and it is true he was asked if he had something to do with it, but it seems to me at the time he was asked more as the laying

(Testimony of Paul W. Smith.)

of a foundation as to whether or not he knew the person who signed the instrument than as to its contents. It makes no difference how this witness viewed the application, the application is in writing and speaks for itself as to who the application was made by and who it was made for. Asking him what he considered it is improper cross-examination, an invasion of the province of the jury in asking him to construe a record. The objection will be sustained.

Defendant's Offer of Proof No. 2

The defense offers to prove by the witness on the stand that he treated the application as that made by the Stockman's Club.

Mr. Pease: Objected to on the same grounds as stated in the last previous objection, particularly that the matter which is the subject of the offer is a matter of record, that the answer, if given, would not be the best evidence for that reason, and that the same is no part of the proper cross-examination of this witness, and if proper at all would be matter to be offered as part of the defense in the case.

The Court: The offer will be filed as defendant's offer of proof No. 2, and the objection will be sustained. [73]

Q. Is it not a fact, Mr. Smith, that you advised Mr. Buley that the application could not be granted to the Stockman's Club because they had not been in existence as a club for a sufficient length of time and that——(interrupted)

(Testimony of Paul W. Smith.)

Mr. Pease: The question is objected to on the same grounds as stated in the objection to the last preceding offer of proof on the part of the defendant.

The Court: Objection is sustained. It is hearsay also.

Defendant's Offer of Proof No. 3

The defendant offers to prove that the witness would have answered the question in the affirmative.

Mr. Pease: To the defendant's offer of proof 3, the government objects on the same grounds as stated to the last question on cross-examination.

The Court: The offer of proof will be filed and the objection will be sustained.

Q. Did you, Mr. Smith, in considering plaintiff's Exhibit 2, the application for retail liquor license, have occasion at any time to talk to Mr. De Pratu?

Mr. Pease: If the Court please, I don't know where this is leading, but I will object to it on the ground that a conversation is apparently not an official matter, not a matter of official action, and that whatever might have transpired in such conversation could not constitute material matter upon the issues in this case. Further that if proper at any [74] point, it would be in the defendant's case in chief, not upon cross-examination.

Mr. Acher: I will reframe the question. Isn't it a fact, Mr. Smith, that you did not have any dealings with Mr. De Pratu as an applicant, but that

(Testimony of Paul W. Smith.)

you did have dealings with a representative of his, an attorney at law, Sherman W. Smith.

Mr. Pease: I will object to that as improper cross-examination, your Honor.

The Court: Yes, the objection will be sustained.

Defendant's Offer of Proof No. 4

We offer to prove that the witness would have answered the question yes.

Mr. Pease: To the offer of proof numbered 4, the government objects on the same ground as given to the offer of proof numbered 3.

The Court: It will be filed. The objection is sustained.

Q. Is it not a fact, Mr. Smith, that in considering whether or not a license should be issued under plaintiff's Exhibit 2, the decision of the Liquor Control Board was based upon your advice?

Mr. Pease: This is objected to on the same grounds as made to this entire line of cross-examination, that the matter is improper cross-examination and is irrelevant to the issues of the case, or if relevant at all is part of the defense of the case.

The Court: Yes, sustained.

Q. Is it not a fact, Mr. Smith, that the citizenship of Mr. L. P. De Pratu as an individual was not considered in connection with plaintiff's Exhibit 2 when you gave your decision as to the application?

Mr. Pease: Objected to on the ground that it would be not the best evidence, it would be a matter

(Testimony of Paul W. Smith.)

of record; it is improper cross-examination; if relevant at all, it is part of the defense in the case, and isn't relevant as such.

The Court: It is entirely immaterial whether it was or was not considered by the board. It is a matter extraneous to this case. The question here before the jury, and the only question here is whether or not the defendant represented himself to be a citizen as set out in the indictment, and whether or not, if he did, that representation is true. That is the charge and that is the question here. The objection will be sustained.

Defendant's Offer of Proof No. 5

Defendant offers to prove that the witness would have answered yes.

Mr. Pease: The government objects to the offer of proof numbered 5 on the same grounds as stated in the last objection, the objection to the last question.

The Court: The offer of proof will be filed, and the objection will be sustained.

Q. Showing you plaintiff's Exhibit 2, the application for [76] retail liquor license dated January 15, 1946, and defendant's proposed Exhibit 4, which you identified yesterday, I will ask you whether or not in your consideration of those applications it was all a part of the same transaction?

Mr. Pease: Objected to on the ground it is not the best evidence.

The Court: Yes, and calling for a conclusion of the witness. Sustained.

(Testimony of Paul W. Smith.)

Q. Were both papers considered simultaneously?

Mr. Pease: Objected to as repetition, also as not the best evidence.

The Court: I am going to overrule the objection to this particular question because I think it is completely harmless whether they were or whether they weren't. To me the gist of the offense, if an offense was committed—if there was any offense committed at all, it was committed when the application was filed. What happened to the application afterwards, what the Board did with with it afterwards, what this witness as an official of the State of Montana did with it afterwards is a matter of no moment at all. I am going to overrule the objection.

A. Yes.

Mr. Acher: In view of the answer, your Honor, I would like to renew my offer of plaintiff's Exhibit 4. I have some authorities I would like to submit; I have some authorities and will [77] give a copy to the District Attorney.

The Court: Do you have any objection to the offer, Mr. Pease?

Mr. Pease: Yes, I have the same objection as made yesterday that the record in the case and the record in the board itself shows that this is not the same transaction.

The Court: Well, the objection is going to be sustained as not proper cross-examination. As to the application, the charge in the indictment relates to a retail liquor license. which is not a beer license at all.

Mr. Acher: That's all.

Mr. Pease: That is all, Mr. Smith. If the Court please, and counsel, Mr. Reed, the administrator has requested that he may be excused and I expect Mr. Smith would like to go also, and I would like to have these gentlemen excused temporarily subject to call. Mr. Acher might want them back, I don't know.

(Witness excused.)

The Court: Very well. Call your next witness.

Mr. Pease: The government offers in evidence plaintiff's Exhibit No. 5.

The Court: Is there any objection to the offer?

Mr. Acher: Yes, your Honor. Our only objection, your Honor, is upon the ground that the same is incompetent as evidence to prove that the defendant is not a citizen and upon the further ground it would not be admissible as an admission until the corpus delicti has first been shown by competent evidence.

The Court: Objection will be overruled, the exhibit will be [78] admitted.

(Plaintiff's Exhibit 5, being a certified copy of Alien Registration Form signed by Louis Raphael De Pratu and bearing date stamp, "Great Falls, Mont., Nov. 16, 1940," was here received in evidence and read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk.)

Form G-84
(Revision of 8-15-43)

#6747 - US v Louis R. DePratu

95

Ex 5
(admitted)

United States of America

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

January 16, , 194

PURSUANT to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I HEREBY CERTIFY that the annexed document is a true copy of the original contained in the record of the Immigration and Naturalization Service, Department of Justice, relating to Louis Raphael De Pratu, file No. A-5289642.

IN WITNESS WHEREOF I have hereunto set my ha and caused the seal of the Department of Justi Immigration and Naturalization Service, to affixed, on the day and year first above writte

[SEAL]

Joseph Savoretti
Assistant Commissioner,
Immigration and Naturalization Servi

U. S. GOVERNMENT PRINTING OFFICE 548784

LMS/fc

EXHIBIT #2

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UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ALIEN REGISTRATION FORM

OFFICE USE

(a) My name is Louis (FIRST NAME) Raphael (MIDDLE NAME) Delratu (LAST NAME)

(b) I entered the United States under the name of Louis Raphael Delratu

(c) I have also been known by the following names (include maiden name if a married woman, professional names, nicknames, and aliases): " Fatty" nickname

(a) I live at Wolf Langman Livestock Co. (STREET ADDRESS OR RURAL ROUTE) Great Falls (CITY) Cascade (COUNTY) Mont. (STATE)

(b) My post-office address is P.O. Box 884 Great Falls, (POST OFFICE) Mont. (STATE)

(a) I was born on October (MONTH) 21 (DAY) 1878 (YEAR)

(b) I was born in (or near) Alexandera (CITY) Ontario (PROVINCE) Canada (COUNTRY)

I am a citizen or subject of Uncertain, but last of Canada (COUNTRY)

(a) I am a (check one): Male [X][1] Female [ ][2]

☆(b) My marital status is (check one): Single [ ][1] Married [ ][2] Widowed [ ][3] Divorced [X][4]

(c) My race is (check one): White [X][1] Negro [ ][2] Japanese [ ][3] Chinese [ ][4] Other

I am 5 feet, 4½ inches in height, weigh 142 pounds, have Gray (COLOR) hair and Brown (COLOR) eyes.

(a) I last arrived in the United States at Sault St. Marie, Mich. (PORT OR PLACE OF ENTRY) on Aug.15,1896 (MONTH, DAY, AND YEAR)

(b) I came in by Train (NAME OF VESSEL, STEAMSHIP COMPANY, OR OTHER MEANS OF TRANSPORTATION)

(c) I came as a (check one): Passenger [X][1] Crew member [ ][2] Stowaway [ ][3] Other

(d) I entered the United States as a (check one): Permanent resident [X][1] Visitor [ ][2] Student [ ][3] Treaty merchant [ ][4] Seaman [ ][5] Official of a foreign government [ ][6] Employee of a foreign government official [ ][7] Other

(e) I first arrived in the United States on August (MONTH) 15 (DAY) 1896 (YEAR)

(a) I have lived in the United States a total of 43 years.

(b) I expect to remain in the United States Permanently (PERMANENTLY, OR DURATION OF EXPECTED STAY)

(a) My usual occupation is Rest runt (b) My present occupation is Restuarant

(c) My employer (or registering parent or guardian) is self (NAME)

whose address is ---------- (STREET ADDRESS OR RURAL ROUTE) (CITY) (STATE)

and whose business is

All items must be answered by persons 14 years of age or older. For children under 14 years of age, only the items marked with a (☆) must be answered by the parent or guardian. All answers must be accurate and complete.

10. I am, or have been within the past 5 [redacted] intend to be engaged in the following activities:
In addition to other information, lie. memberships or activities in clubs, organizations, or societies ....

.... None ....

11. My military or naval service has been .... None .... (COUNTRY)

.... (BRANCH OF SERVICE) .... From .... (DATE) to .... (DATE)

12. ☆ I have not (HAVE, HAVE NOT) applied for first citizenship papers in the United States. Date of application ....

First citizenship papers received .... (DATE), ... (NUMBER), ... (CITY), ... (STATE)

Filed petition for naturalization .... (DATE), ... (CITY), ... (STATE)

13. ☆ I have the following specified relatives living in the United States:

Parent(s) .... None .... (NONE, OR ONE, OR BOTH) Husband or wife .... No .... (YES OR NO) Children .... 3 .... (NUMBER)

14. I .... have .... (HAVE, HAVE NOT) been arrested or indicted for, or convicted of any offense (or offenses). These offenses are

Nature of offense	*Date of arrest*	*Place of arrest*	*Disposition of case*
Bootlegging	about 1925	Great Fall	Case dismissed

15. Within the past 5 years I .. have not .... (HAVE, HAVE NOT) been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government. ....

RIGHT

AFFIDAVIT FOR PERSONS 14 YEARS OF AGE AND OLDER

I have read or have had read to me the above statements, and do hereby swear (or affirm) that these statements are true and complete to the best of my knowledge and belief.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post-office stamp below.

Louis Raffael De Bra .... (SIGNATURE OF REGISTRANT) Tullaney P.O. (REGISTERING OFFICIAL)

AFFIDAVIT FOR PARENT OR GUARDIAN ONLY

I am the .... (PARENT OF, OR GUARDIAN OF, OR PERSON RESPONSIBLE FOR)

the above-named alien, who is .... (UNDER 14 YEARS OF AGE OR INSANE)
and have made the above allegations for him (or her). I have read or have had the same read to me, and do hereby swear (or affirm) that they are true and complete to the best of my knowledge, information, and belief.

.... (SIGNATURE OF PARENT OF, OR GUARDIAN OF, OR PERSON RESPONSIBLE FOR THE ALIEN)

PRINT NAME, ADDRESS, AND BUSINESS OF PERSON SIGNING THIS AFFIDAVIT IN 9(c), ABOVE.

Subscribed and sworn to (or affirmed) before me at the place and on the date here designated by the official post office stamp at the right.

.... (REGISTERING OFFICIAL)

S. MONT

16—10463

Mr. Pease: The government now offers in evidence exhibit No. 6.

Mr. Davidson: If the Court please, the defendant objects to the introduction of plaintiff's exhibit 6 on the ground it is not properly authenticated and on the ground it is negative testimony.

Mr. Acher: And on the further ground there is no showing, assuming such records have to be kept, they were kept in conformity with the law. [79]

* * * * * *

PLAINTIFF'S EXHIBIT No. 6
(Admitted)

United States of America, Department of Justice,
Immigration and Naturalization Service

April 10, 1947.

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I Hereby Certify that the annexed document is an original recorded statement of the Immigration and Naturalization Service, United States Department of Justice, signed by Henry Colarelli, Chief of the Information, Mails and Files Section, of the Central Office, and by T. B. Shoemaker, Acting Commissioner of Immigration and Naturalization.

In Witness Whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

[Seal] /s/ L. PAUL WINNINGS,
General Counsel,
Immigration and
Naturalization Service.

April 10, 1947.

CERTIFICATE OF NON-EXISTENCE OF NATURALIZATION RECORD

I, Henry Colarelli, hereby certify to the following:

1. That I am Chief of the Information, Mail and Files Section, Office of Administrative Services, of the Central Office, Immigration and Naturalization Service, United States Department of Justice, and by virtue of such position and the authority thereof, that I am custodian of all records of the Central Office of the United States Immigration and Naturalization Service, including any and all naturalization records required to be filed with the Commissioner of Immigration and Naturalization pursuant to Section 337, Nationality Act of 1940 (8 U.S.C. 737) and pursuant to the similar requirements of the Act of September 27, 1906 (43 Stat. 596) in effect prior thereto.

2. That I have caused diligent examination and search to be made of said records, and that there does not appear therein any record filed pursuant to the foregoing statutes nor any record whatsoever evidencing the naturalization of one Louis Raphael De Pratu or Louis Patrick De Pratu.

[Seal] /s/ HENRY COLARELLI,
Chief, Information, Mail and
Files Section.

Affirmation

I affirm that Henry Colarelli, whose signature is affixed next above, now holds the title and position, and is custodian of Central Office records of this Service, as described in the foregoing.

[Seal] /s/ T. B. SHOEMAKER,
Acting Commissioner Immigration and Naturalization Service.

The Court: Well, that seems to be the answer, Mr. Acher. The government says that of all the millions of people that might be named in this record that no such name as that appears. The objection will be overruled and the exhibit will be admitted in evidence.

(Plaintiff's Exhibit 6, being a certificate by the Department of Justice Immigration and Naturalization Service, signed by L. Paul Winnings, General Counsel, and dated April 10, 1947, was here received in evidence and read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk.)

(Whereupon, court stood in recess from 11:00 o'clock a.m., until 11:10 a.m., at which time the following proceedings were had:)

(Jury returns to courtroom.)

Mr. Pease: In the recess, I have conferred with Mr. Acher, your Honor, and accordingly I understand that it may be stipulated between the parties to the cause that on February 8, 1936, this defendant filed an application for registry as an alien, signed by him, and stating in part, "I, Louis Raphael De Pratu, Gillman, Montana, an alien, believing that there is no record showing that I am now a lawful permanent resident of the United States, hereby request that under the provisions of the Act of Congress approved March 2, 1929, a record of registry of my arrival in the United States be made," and further Mr. Acher desires to have included in the stipulation a stipulation which [83] he will add.

Mr. Acher: That on April 15, 1937, the defendant was advised by the United States Department of Labor Immigration and Naturalization service that the central office in Washington had cancelled the application for registry filed by Louis Raphael De Pratu on February 10, 1936, and returned him the registry fee submitted with his application. The Central office further advised that this action was taken for the reason that registry in the case was unnecessary since it appeared that De Pratu entered the United States prior to June 30, 1906.

The Court: Very well, it will be so understood as stipulated and the record will so show it.

FRANK S. NOONEY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pease:

Q. Please state your name.

A. Frank S. Nooney.

Q. Where do you reside?

A. In Spokane, Washington.

Q. Are you an official of the United States?

A. Yes.

Q. What is your official capacity? [84]

A. I am Assistant to the District Operations Officer in the Spokane Office of the Immigration and Naturalization Service.

Q. What is the territorial jurisdiction of that office?

A. It takes in the State of Montana, the State of Idaho, Washington, east of the Cascade Mountains, and the five northeast counties of Oregon.

Q. Does that office have a permanent record of naturalization proceedings in that territory?

A. It has a record of all naturalizations in that territory.

Q. And what persons, person or persons, have in their custody, in their official custody, that record?

A. The District Director would be the official custodian. He is head of the District.

(Testimony of Frank S. Nooney.)

Q. What is your capacity with reference to those records? A. I am assistant.

Q. Do you have access to the records and do you have authority to possess them and use them?

A. Yes.

Q. Do you have the records here?

A. I have the file in the De Pratu case here.

Q. You have the file. Now, have you made a search of the record to determine whether this defendant, Louis Raphael De Pratu was ever naturalized as a citizen of the United States?

A. I have.

Q. And what has been the result of that search?

A. I found no record.

Q. Do you have any records relating to this defendant? A. Not of his naturalization.

Q. Not of his naturalization? A. No.

Mr. Pease: You may cross-examine.

Cross-Examination

By Mr. Davidson:

Q. You state you have no record of application for naturalization made by Mr. De Pratu. Isn't it true that if a child is automatically made a citizen of the United States by reason of the naturalization of his parent, you would have no record of it?

Mr. Pease: Objected to as calling for the opinion of the witness upon matters which the Court takes judicial notice of as a matter of law.

The Court: No, I don't think so, because as I understand the question, he was asked whether or

(Testimony of Frank S. Nooney.)

not he has a record of children whose parents have been naturalized during minority. Objection overruled.

A. Not necessarily.

Q. You would have if they applied for a derivative certificate? A. That's right.

Q. But otherwise you would not have?

A. That's right. [86]

Q. Mr. Nooney, do you know whether or not that is true of every immigration and naturalization office with respect to the records of children?

A. Yes, sir; that is correct.

Redirect Examination

By Mr. Pease:

Q. Do you have a record, does your office, rather, have a record of aliens residing within that territory who have not been naturalized?

A. Yes, we do.

Q. And have you made a search of that record with reference to the matter of Louis Raphael De Pratu with reference to the matter of Louis Raphael De Pratu or Louis Patrick De Pratu?

A. I have searched all records in our office with reference to Louis Raphael De Pratu.

Q. What does that search disclose?

A. We have a record of his registration as an alien.

(Witness excused.)

ARTHUR MATSON

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Pease:

Q. What is your name?

A. Arthur Matson. [87]

Q. Where do you live?

A. I live in San Francsco at the present.

Q. Are you an officer of the United States?

A. Yes.

Q. How long have you been such?

A. Twenty-four years.

Q. In what station, your capacity at the present time, your official capacity?

A. I am an Immigra*nt* Inspector.

Q. Previous to having your post of duty in San Francisco, was it here in Montana? A. Yes.

Q. Where were you stationed in Montana?

A. Sweetgrass, Montana.

Q. Do you know the defendant in this case, Louis Raphael De Pratu? A. Yes, sir.

Q. Did you have to do with this defendant in the month of September, 1946? A. Yes, sir.

Q. I will ask you whether a Board of Special Inquiry was instituted or constituted at that time?

Mr. Acher: One moment. To which we object on the ground it is calling for a conclusion of the witness, assuming facts not shown by the record. The regulations and laws set forth [88] what would have to be done to constitute a board.

(Testimony of Arthur Matson.)

Court: Is there anything in writing concerning that?

Mr. Pease: The record was made, your Honor, and I have the record here. I was asking some preliminary questions.

The Court: Well, if it is simply preliminary and you will follow it up with the record, I will overrule the objection. However, if you don't, I think I should sustain it at this point.

Q. Were you a member of a board which sat at Sweetgrass, Montana?

A. Yes, I was chairman of that Board.

Q. You were Chairman of that Board. Was a record made of the constitution of the Board, or constituting of the Board and of the hearing, or either? A. Yes, there was.

Q. I show you plaintiff's Exhibit No. 7, Mr. Matson, and ask you to examine it?

A. This is a transcript of the record.

Q. And who caused that to be made?

A. The Clerk, who was a member of the Board, made it in shorthand and thereafter made this transcription.

Q. Did you participate in the proceedings, that is in the taking of testimony before that Board?

A. Yes.

Q. And did you see the defendant, De Pratu, there at that time? [89] A. Yes.

Q. I show you page 10 of the exhibit, Exhibit No. 7, page 10.

(Testimony of Arthur Matson.)

Mr. Acher: I don't think it is an exhibit yet.

Mr. Pease: It is an identified exhibit. I know it isn't admitted.

Q. I am showing you Exhibit 7 and asking you if you were personally present?

A. Yes, I propounded questions.

Q. You personally propounded questions to the witness? A. That's right.

Q. Is the record there made—you may state whether the record there made of the questions and answers on page 10 are or are not correctly given according to your recollection of the fact?

Mr. Acher: One moment, to which we object upon the ground that a proper foundation has not been laid, and it appears that someone else took the testimony, and I would like to ask a question or two in support of my objection.

Examination

By Mr. Acher:

Q. Mr. Matson, you testified that a Clerk took stenographic notes? A. That's right.

Q. And he made a transcription?

A. That's right. [90]

Q. Now, since you have been here for this trial, you have refreshed your recollection by reading his transcript, have you not?

A. I read it, yes.

Q. Several times?

A. Not necessarily, because this is a case that has remained with my memories.

(Testimony of Arthur Matson.)

Q. And how many cases, how many people do you admit, have you admitted since September, 1946?

A. I admit lots of people but I don't hold very many of these hearings.

Q. The transcript you hold in your hands was not written by you? A. No.

Q. Have you with you the original notes that were taken at the hearing?

A. I believe they are in the courtroom, yes. I don't have them with me personally; they are not in my custody at the present.

Mr. Acher: We object on the ground that the proper foundation has not been laid. The witness has already testified he has refreshed his memory from things, and things not written by himself, but by someone else.

The Court: He also testified that he personally propounded these questions. What other foundation is necessary for the [91] testimony of the witness who said he propounded certain questions to another individual.

Mr. Acher: He says that as a result of having read over something somebody else wrote.

The Court: It makes no difference. Did you hear the answers given to those questions as propounded.

The Witness: Yes.

Mr. Acher: We submit he should not be permitted to use this transcript in testifying as to his recollection because it hasn't been—(interrupted)

(Testimony of Arthur Matson.)

The Court: The District Attorney is doing—now is identifying a transcript by a man who was there and asked questions appearing here and the answers given to the questions.

Mr. Acher: I didn't know the record showed that.

The Court: I just asked him the question if those answers were given, and he said yes. It was in response to a question of mine. The objection will be overruled.

Mr. Pease: I will ask you to read down to the 9th answer.

Mr. Davidson: We object on the ground that no proper foundation has been laid, because it hasn't yet been shown that the testimony was given at a Board duly authorized to administer oaths and to take testimony.

The Court: Well, that goes back to the original objection that Mr. Acher made as to how, in what manner this Board was convened. Was there a writing convening it, or how or in what [92] manner it was convened. Whether the Board had authority to administer oaths, or not, is, in my opinion, something that is immaterial, because the statute doesn't require that a representation of citizenship be made under oath before it is unlawful. A representation not made under oath, if untrue, would be as unlawful as one made under oath.

Mr. Acher: The indictment in the third count charges it. We have a case in 133 Federal second which went into great detail as to the authority of

(Testimony of Arthur Matson.)

the officer, and it was held there was no offense because the officer wasn't qualified. It is on page 15 of the brief.

The Court: Well, yes, that was a case of perjury. This isn't a case of perjury at all.

Mr. Acher: It is our position that the third count charges perjury because it says it was done under oath, and it says "Wilfully and falsely," and as the language of 746(a)(18)—(interrupted)

The Court: The third count, in my opinion, isn't legally sufficient to charge perjury. If the man was being prosecuted on a charge of perjury, I would have sustained the motion to dismiss on the third count, because in my opinion, the count isn't legally sufficient to charge perjury at all. There may be sufficient in the count, if the statements made under oath by the defendant there before this Board were untrue, were false, it may be that he might be guilty of perjury, but he is not [93] being prosecuted for perjury at all in this case on this indictment. It seems to me that under the authority of the Circuit Court of Appeals of this Circuit, and under the statute, all that is necessary to charge the offense in the indictment is contained in the first seven lines of the indictment, and that all after that, to me, is surplusage in the indictment, not necessary to the charging of the offense at all. It is all evidence, as I view it. It is simply a recitation of some of the evidence and circumstances and what transpired. Well, we are getting away from the question. Ordinarily, as far as I know, the procedure is that

(Testimony of Arthur Matson.)

when a writing has been offered in evidence and admitted by the Court, the witness doesn't read the exhibit to the jury, it is done by counsel in the case.

Mr. Pease: I believe that is the proper course. I will offer in evidence the first nine questions and answers on page 10 of Exhibit 7 for identification.

The Court: As I understood, you have already made the offer and over objection it was admitted.

Mr. Pease: I don't believe it was offered, your Honor.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m., the same day, January 8, 1948, at which time the following proceedings were had:)

ARTHUR MATSON

resumed the stand for further

Direct Examination

By Mr. Pease:

Mr. Pease: If the Court please, to clarify the record, I want to now offer the following portions of plaintiff's Exhibit [94] 7, namely, the certificate appearing at the front of the instrument, that portion of page 1, consisting of the title of the proceedings and the recitals as to the members of the Board, the number, the serial number of the board, date and so forth. In other words, down to and including the words "determine admissibility," and that portion of Page 10 of the proceedings being the testimony of the witness*ed* named as Patrick De Pratu down to the ninth answer given and shown upon page 10.

PLAINTIFF'S EXHIBIT NO. 7

(Not Admitted)

United States of America, Department of Justice, Immigration and Naturalization Service, Sweetgrass, Montana

January 2, 1948

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I hereby certify that the annexed paper is a true copy of the original appearing in the record of the Immigration and Naturalization Service, Department of Justice, relating to Louis Joseph Gonzy, file No. 1011-1720.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first written above.

[Seal] /s/ JOHN A. PHILIPS,
Officer in Charge, Immigration and Naturalization Service.

Record of Hearing

Before a Board of Special Inquiry, Held at Sweetgrass, Montana

Date: September 11, 1946.

Names of Aliens—Louis Joseph Gonzy, Male, Age 35 years.

Present: Insp. Arthur Matson, Chairman; Henry A. Dube, Member; John D. Mead, Member-Secretary.

INT.—

B.S.I. No. 1011-1720

Arrived (date and manner): September 11, 1946, via private auto.

Held by: Henry A. Dube.

Cause: Determine admissibility.

* * * * * * *

Mr. Patrick De Pratu

called to the board room.

Chairman to Mr. De Pratu: This board wishes to consider your testimony in the matter of the application of Mr. Gonzy for admission to the United States. Are you willing to testify under oath before this board?

A. Yes.

Q. Do you solemnly swear that the statements you make at this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God? A. Yes.

Q. You are warned that if you wilfully and knowingly give false testimony at this proceeding, you may be prosecuted for perjury, the penalty for which is imprisonment of not more than five years or a fine of $2000, or both such fine and imprisonment. Do you understand? A. Yes.

Q. What is your full name?

A. Louis Patrick De Pratu.

Q. Where were you born?

A. In Ontario, Canada.

Q. Of what country are you now a citizen?

A. United States.

Q. When and where did you acquire United States citizenship?

A. I come over here when I was a little kid. I crossed at Sault Ste. Marie.

Q. How did you acquire United States citizenship?

A. I didn't. They told me that I was under age and that I was a citizen.

Q. Was your father born in the United States?

A. No, in the old country. I acquired United States citizenship through my father who naturalized in the United States while I was a minor.

* * * * * * *

Mr. Davidson: To which the defendant objects, if the Court please, on the grounds that it has not yet been shown that a duly constituted Board of Inquiry was organized or any Board with authority to inquire into defendant's citizenship. It affirmatively appears from the offered exhibit that the

hearing relates to one Louis Joseph Gonzy and the materiality of defendant's citizenship is not shown to be a proper or necessary subject of inquiry. That it does not appear that the alleged Board of Inquiry had a matter before it that could properly be considered by it with respect to the alien about which the hearing was held. That the record further affirmatively shown that a proper Board of Inquiry was not organized at the time and place referred to in the proposed exhibit, and that no proper foundation has been laid for the admission of the proposed exhibit.

Mr. Acher: We should like to be heard briefly on one proposition, at least, that we have not discussed before. [95]

(Jury retires from Courtroom.)

Mr. Acher: If the Court please, at the outset on the proposed portion of the exhibit which has been offered, I think it will appear that Inspector Dube excluded the alien, and thereupon Inspector Dube and two other alleged inspectors conducted a hearing as a Board of Inquiry. We found only one case on the subject, page 14 of our brief, United States vs. Redfern.

The Court: That is a prejury case you talk about, isn't it?

Mr. Acher: No, that hasn't to do with perjury. It has to do with the holding that a Board of Inquiry which included as a member a man who had theretofore excluded the alien was void ab initio. If the Court please, all the decisions say there must

be some adequate reason or some right to inquiry or ascertain a defendant's citizenship. It is true that in a later case they have held that where a man makes a representation to procure employment and the like, the employer has adequate reason, but here, we have a decision which shows on its face, which shown the Board of Inquiry illegal and void. In that case it was held their finding was not grounds for excluding the alien, and we submit there is no such showing as would authorize a conviction any more than if it were shown the defendant made this statement boastingly or as a joke, as was suggested in the Achtner case, 144 Federal second. It is further submitted that before this would be admissible, it would [96] have to be shown that the materiality of the defendant's citizenship had something to do with the matter. If the title of the proceeding were that of United States against De Pratu, the question would be different, but here it shows on its face that it relates to an alien named Gonzy; and we further submit there is nothing in the record to date to show that the Board of Inquiry had any authority to consider the matter of excluding or admitting the alien Gonzy; and in this connection, we think it would be developed, if it were shown here, that this alien was excluded on the theory he would violate the Contract Labor Laws, had a contract for employment in the United States, whereas, the statute, which we have cited in our brief, says a professional singer or artist is exempt from the Contract Labor Laws, and if that is the

fact, as the law says, we submit that the government would have to show that this was a matter that a Board of Inquiry could properly look into. That had not been done, and until it was done, a proper foundation was not laid for the admission of this exhibit.

Mr. Pease: With reference to the Redfern case, your Honor, we have examined the abstract of the case, and it appears in the first instance that the case is clearly distinguishable from the present case. The aggrieved party in the Redfern case was an alien who had been excluded by the Board of Special Inquiry in question, and, therefore, it was a question directly involved in the controversy, namely the charge [97] that the Board contained an unqualified member or a member who was prejudiced or was not impartial, and the only person who had any standing in court to question was that the alien Redfern who had been excluded.

The Court: That was a direct attack upon the order of that Board of Inquiry?

Mr. Pease: That is correct. Here it comes collaterally. In the second place, the District Court—this is not a Circuit Court of Appeals decision, it is a District Court decision for Louisiana—to us it seems very strange, in that there is no statute providing that the officer who initiated the proceeding against the alien seeking admission may not be qualified. It was not a Circuit Court case, your Honor, and it was in the year 1910. These statutes have been revised a number of times since then. However, there isn't any statute now existing or

which existed in 1946—whether it did formerly exist in 1910, or not, I don't know, we haven't had time to search—providing, for instance, that Mr. Dube, who is the agent in question here, was disqualified from sitting on the board of special inquiry by reason of the fact that he had detained the alien and instituted the further investigation of the grounds upon which admission was sought. Section 153 of Title 8 contains apparently all the law on how Boards are constituted. It reads in part, "Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated [98] by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards." Then it goes on to provide in certain cases for maintenance of a permanent board, which this was not, and I have found nothing further in regard to qualifications of members of Boards of Special Inquiry, so it is impossible to understand the Redfern case as applying to the statute as it now exists, whatever it was at the time the case was decided. As to the objection of materiality, I think that has been determined against the objections by the Ninth Circuit Court.

Mr. Acher: May it please the Court, on page 13 of my brief will appear the applicable sections, 152 and 153, and also the Code of Federal Regulations, beginning at the bottom of page 13 and the top of page 14, which shows the regulation with respect to the creation of boards of inquiry. Now, in the Redfern case, there was no statute. It was the Court's opinion in the last paragraph, simply stated, "It is fundamental in American jurisprudence that every person is entitled to a fair [99] trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied to petitioner the right to land was illegal and without power." We then follow that with a case in the Third Circuit. I admit it is a perjury charge, but nevertheless, they did go into the status of the officer, found he was not authorized to administer an oath, and, therefore, the accusation could not be supported. In connection with Section 152, it seems to me I should like to call atention to the fact it provides, "Said inspector shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter," and so forth, and "to make a written record of such evidence; and any person to whom such an oath has been administered, under the provisions of this chapter, who shall knowingly or wil-

fully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission, shall be deemed guilty of perjury." I suggest our view has merit; that count 3 comes within that provision, and that the government can't take the position it has that those allegations in Count 3 are surplusage merely because at the top they designate it a violation of 746(a)(18).

The Court: Well, I think no matter how the District Attorney [100] designates the charge, what the charge is is to be determined from the reading of the language of the indictment itself. Too, I see nothing at this time that would justify any criticism of the holding of the Court in United States v. Redfern. I am rather inclined to believe were that particular case before me, the same result might have been reached as was reached by the Court in the Redfern case in Louisiana; and, of course, it does not seem if an alien is being, or rather his right of entry is being determined as an alien, that one of his judges should be a man who had made up his mind as to whether he did or did not have the right of entry. That seems to me simply natural justice. Here it seems to me that there must be some writing some place with reference to the appointment of these boards of inquiry. I think that was done by writing. It seems to me that the statute and the regulations provide, or their full import is that the inspectors shall be designated, by the officer in charge in writing, a board of inquiry for that purpose, and were the question here a question as

to whether or not there actually was a board of inquiry sitting, whether or not they were acting lawfully as a board of inquiry, or if the question before me were one in some way reviewing an act of that so called board of inquiry, why there wouldn't be any doubt in my mind that the objection made by counsel for the defendant that the writing appointing the members of the board of inquiry is the best evidence would be good. No other evidence [101] would be competent in the case to establish the fact if there were a challenge made on that point; but that seems to me to be collateral matter. As I view it, we are not sitting here determining or reviewing anything that the board of inquiry did, we are sitting here under a specific charge that the defendant, upon being interrogated as to his citizenship, said he was an American citizen. That is the end of it, the board of inquiry is collateral matter and matter of no importance here. The question, and, as I view it, the only thing of importance as to the Board of inquiry is whether or not the men who were there, who asked the questions, properly could ask that kind of question and had a right to inquiry; whether or not they were inquiring because of performance of official duty or whether or not they were inquiring out of a matter of idle curiosity that did not concern them either personally or officially; and I am not too certain about how important that is, because the statute under which the prosecution is based simply says that one who falsely represents himself to be a

citizen when he is not, is guilty. I think they might possibly have obviated this by questioning this witness further. The witness might possibly have been interrogated a little further to develop from him, if he knows, who were there, who were present, to develop from him, if he knows, whether or not they were officers of the United States Immigration Service, to develop whether or not, if he knows, what their purpose was in being there, to develop whether or not, if he knows of his own knowledge, what the point of the interrogation was, what was attempted to be established, and whether or not there was a request for any official action after the taking of the testimony. I think there would have been a much better foundation laid if that was done. But, however, the evidence does disclose that this man was an officer of the United States. He has testified to that. He was there, he put these questions. As to his purpose, the object of the things that were done by him, the evidence is not clear. However, I think the evidence is in such condition that the jury might infer from it that he was there as an officer acting in his official position at the time the defendant was interrogated. He said he put the questions to him and that he knows the questions were put and the answers were made. So, I am going to sustain the objection as to the first part of the offer, that is the certificate, and that is because I am going to sustain the objection as to that portion of the first printed page headed "Record of hearing before a Board of Special Inquiry

held at Sweetgrass, Montana," because in my view, the evidence, as it now stands, is not sufficient to establish that there was a board of special inquiry either de jure or de facto acting at the time. I am going to overrule the objection as to the—(interrupted)

Mr. Acher: In view of the Court's ruling to date, your Honor, I think we should make separate objections to the questions [103] 1 to 9 so each will be subject to the objection.

The Court: Well, I think I will sustain the objection to this offer of this exhibit in its entirety. However, if the District Attorney desires, if the witness was there and submitted certain questions to this defendant and certain answers were made and he knows that of his own knowledge, the District Attorney may desire to inquire further along those lines.

(Plaintiff's Exhibit 7, being entitled "Record of Hearing before a Board of Special Inquiry held at Sweetgrass, Montana, Date September 11, 1946, and bearing certificate signed by John A. Philips, Officer in Charge, Immigration and Naturalization Service, dated January 2, 1948, was here refused admission in evidence. The same will be certified to the Circuit Court of Appeals by the Clerk.)

Mr. Pease: I wish also to lay further foundation, your Honor.

The Court: Very well.

(Jury returns to Courtroom.)

(Testimony of Arthur Matson.)

Q. (By Mr. Pease): Mr. Matson, you testified this morning concerning a hearing which was had at which you presided in the month of September, 1946, at Sweetgrass, Montana. Was or was not Sweetgrass, Montana, at that time, a port of entry?

A. It is a regularly designated port of entry for aliens.

Q. Of the United States? A. That's right.

Q. You state you were a chairman?

A. That's right. [104]

Q. Who were the other members of the Board?

Mr. Acher: One moment. To which we object. The record would be the best evidence.

The Court: Yes, that is true. Were there other men there besides yourself? A. Yes.

The Court: What were their names?

A. Inspector Dubie and Inspector Mead.

The Court: Inspector Dubie, how long have you known him? A. Three or four years.

The Court: Do you know what if any office he held with the United States?

A. Inspector with the Immigration and Naturalization Service.

The Court: How long had you known Inspector Mead?

A. Approximately the same time.

The Court: Do you know whether or not on that September 11, 1946, he held any official position with the United States.

A. Both were immigrant inspectors.

(Testimony of Arthur Matson.)

The Court: How long had Inspector Mead been an inspector?

A. Oh, he arrived in Sweetgrass during the war and probably in 1943.

The Court: You, yourself, were an immigration inspector at that time? A. Yes.

The Court: Very well, proceed. [105]

Q. (By Mr. Pease): Where is Inspector Mead at this time?

A. He is serving in the same capacity at Anchorage, Alaska.

Q. How long has he been there?

A. He went up there probably four or five months ago.

Q. Was any other record made—or what was done to bring these men together for this purpose?

A. Well, they were orally designated by the inspector in charge, and I was the inspector in charge on that date, and since only three members were available, why Inspector Mead and Inspector Dubie and myself composed the Board of Special Inquiry.

Q. Well, were you the person who summoned the others or requested them?

A. Yes, I did.

Q. Did you do that in writing or verbally?

A. Orally.

Q. Was there any written record made of the appointment of either of those men or yourself?

A. The only written record would be on the first page of the stenographic notebook made by the clerk and member, Inspector Mead.

(Testimony of Arthur Matson.)

Q. Well, the stenographic notebook you referred to is available here, is it not?

A. I am quite sure it is.

Q. Is there any part in longhand, or is it all in shorthand? [106]

A. I have never seen the record.

Q. You have never seen them. Well, outside of the record made in Exhibit 7, was there any other written record kept in the office, made or kept in that office?

Mr. Acher: We object on the ground that he heretofore testified it is in the notebook which is here in Court. He hasn't seen it—(interrupted)

The Court: What good would that be unless you know shorthand if it is written in shorthand hieroglyphics? It is something that cannot be read except by one with a knowledge of shorthand. I know that if you produce a shorthand record before me, it wouldn't give me any information at all.

Mr. Acher: My point, your Honor, is simply the man that made that would be the man to call.

The Court: But the whole point that seems to appeal to me is that here is a man who said he was there, he put the questions and he knows the answers that were made. What better record there can be than that, I don't know. He was there, he was personally present and what all this time is being taken up for to prove a record when that is the situation, when the man said he was there and asked him the questions, I don't know. I don't know of any possible better record there can be, and I

(Testimony of Arthur Matson.)

so hold. Ask the witness those questions and answers you want to prove; ask him if he knows.

Mr. Pease: Very well. Will you state what questions you [107] asked of the defendant De Pratu at that time, and what answers he made?

A. Do you wish to have me make them from memory?

Q. Is it possible for you to give them correctly without reading the transcript which you testified about this morning?

A. I can. I asked him several questions which are a formality insofar as our work is concerned, but word for word, of course that is impossible.

Q. Can you do it accurately by referring to the transcript you have in your hand? A. Yes.

Q. Please do so.

Mr. Acher: That is the whole point of our objection. He does have to come back to the transcript. He has shown himself not qualified to do it.

The Court: How has he shown himself not qualified? Any memorandum this witness knows is true is sufficient for him to refresh his memory with, isn't it? Do you have any statute?

Mr. Acher: I have a statute. I will hand it to your Honor. It is Section 10664, Revised Codes of 1935, and a Montana case in 99 Montana.

The Court: Well, of course, the statute says a witness is allowed to refresh his memory respecting a fact from anything written by himself or under his direction. That doesn't say that is the only method known to the law, but it says a witness [108]

(Testimony of Arthur Matson.)

may refresh his memory. That is one of a number of ways, this isn't all inclusive and excluding everything else. If that was the case, records of book entries and things of that kind and other voluminous records that are made in the ordinary course of business by a number of different men, no witness could come into Court and testify unless he himself had made the record. Here is a witness that says he knows, after reading that, he knows he propounded the questions that are set out in it. That is his testimony. Did you propound those questions, witness?

A. Yes.

The Court: Who did you propound them to?

A. To Mr. De Pratu.

The Court: A witness in the case?

A. Yes, sir.

The Court: Fold that memorandum up. In any question you propounded to him at that time, did you ask him whether he was or was not a citizen of the United States?

A. Yes, sir.

The Court: What did you say?

A. I usually ask of what country are you a citizen.

The Court: I don't care what you usually say, what did you say to that man?

A. Of what country are you now a citizen.

The Court: What did he say? [109]

A. He said of the United States.

(Testimony of Arthur Matson.)

Q. (By Mr. Pease): Did the defendant during the proceeding referred to express any interest in having the board act one way or another upon this application?

Mr. Acher: Objected on the ground it is immaterial.

The Court: Overruled.

A. He naturally was interested in importing this man Gonzy to appear as a musician at the Stockman's Club in Great Falls.

Mr. Pease: You may cross examine.

Cross-Examination

By Mr. Davidson:

Q. Mr. Matson, were you present during all of the proceeding and asked Mr. De Pratu all the questions asked of him? A. Yes.

Q. Isn't it true, Mr. Matson, on that day you had no reporter?

A. No reporter? A clerk was reporter.

Q. Do you recall me being there in Sweetgrass at that time? A. Yes.

Q. Isn't it true that just prior to the time you started asking the witness questions that you advised me you had no reporter but you would have to do the best you could? A. That's right.

Q. During the time this Mr. Mead was taking the notes, did he have any difficulty with any of the witnesses? [110]

A. He is a shorthand man himself, Inspector Mead is.

(Testimony of Arthur Matson.)

Q. Did he have any difficulty in taking down the notes of the questions and answers of the witness?

A. I don't believe he did.

Q. Well, that wasn't the only question you asked Mr. De Pratu, was it? A. Oh, no.

Q. Did you ask him the question as to how he acquired United States citizenship? A. Yes

Q. And did he answer the question, "I didn't"?

A. He mentioned the fact that when he entered the United States—(interrupted)

Q. Will you please confine yourself to that question.

A. Yes, I am trying to bring it down.

The Court: Mr. Davidson, the proper rule is that if you are examining a witness from a writing you have in your hand, show the writing to the witness.

Q. Did you ask him how he acquired United States citizenship? A. Yes.

Q. What answer did he give you?

A. He said someone had told him he had acquired it because he came to the United States when a young fellow, that's about the way.

Q. Do you know whether or not, in response to that question, [111] he started out by saying, "I didn't"? A. I don't recall that.

Q. But you do recall him saying he became a citizen by reason of his father's naturalization?

A. He said something about that too, but his first reply was someone told him he had acquired it because he came to the United States when he was a young fellow.

(Testimony of Arthur Matson.)

Q. Showing you now this memorandum, Mr. Matson, I will ask you to inspect it and particularly that marked question, "How did you acquire United States citizenship?" A. Yes.

Q. And the answer thereto?

A. "I didn't, they told me I was under age and I was a citizen." Now, I remember that last statement of his, but I didn't remember that.

Q. So, are you now satisfied that in answer to the question "How did you acquire United States citizenship" that the defendant answered, "I didn't, they told me I was under age and that I was a citizen"? A. Well, that's correct.

Mr. Davidson: That's all.

Mr. Pease: That's all.

(Witness excused.)

Mr. Pease: The government rests.

Mr. Acher: At this time we would like to move to strike [112] the portion of the testimony of the witness Matson where, in response to interrogation by the Court, it was stated that the defendant told him he was a citizen of the United States upon the ground that the evidence constitutes a material variance from the allegations of the indictment.

The Court: In what respect?

Mr. Acher: The indictment says that these statements were made before a Board of Special Inquiry. There is no proof of that now. The evidence is it was before Mr. Matson.

The Court: The motion will be denied.

Mr. Acher: At this time, we make a motion for judgment of acquittal, which I have in writing. I may have the wrong thing, your Honor, I see that I——

The Court: It is important in criminal cases, Mr. Acher, to get hold of the right thing. I will give you an opportunity to drop the wrong one and grab the right one, if you can.

Mr. Acher: I will see how that came about. I didn't expect them to rest quite so soon. We will make a motion for judgment of acquittal orally, I don't have it in writing.

The Court: Very well, do you want to make it in the presence or absence of the jury?

Mr. Acher: We would prefer to do it in the absence of the jury.

(Jury retires from the Courtroom.) [113]

The following is the written motion for judgment of acquittal filed on behalf of the defendant at the close of the government's case on January 8, 1948:

(Title of Court and Cause.)

Motion for Judgment of Acquittal

Comes now the defendant and moves the Court to order the entry of a judgment of acquittal upon the following grounds:

1. That the first count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.

2. That the second count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.

3. That the third count of said Indictment fails to charge an offense against the laws of the United States of America, or at all.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant.

Mr. Acher: Comes now the defendant and moves the Court to order the entry of a judgment of acquittal upon the following grounds:

1. That the evidence is insufficient to sustain a conviction under count 1 of the indictment;
2. That the evidence is insufficient to sustain a conviction under count 2 of the indictment;
3. That the evidence is insufficient to sustain a conviction under count 3 of the indictment.

The Court: Do you desire to argue it, or do you submit it?

Mr. Acher: We would like to argue it, your Honor.

The Court: Very well, proceed.

Mr. Davidson: May it please the Court, the most essential element of this offense is the question as to whether or not the defendant is a citizen of the United States, because regardless of what statements might have been made, if the government fails to prove by the evidence that he was not a citizen of the United States, there is no offense.

We submit there is no evidence before this Court showing that this defendant is not a citizen of the United States, and the affirmative evidence, as shown by the exhibits, and particularly by Exhibit

5 of the plaintiff, which is the alien registration form, discloses that the defendant was born October 21, 1878, in Alexandera, Ontario, Canada. He states that he came to the United States at Sault St. Marie, Michigan, on August 15, 1896, and at that time, he was 17 years of age. It further [115] states he has resided in the United States permanently, and his last entry into the United States, as shown in one of these exhibits, is shown to be that same date in 1896. So that we have affirmative evidence that this man came to and has resided in the United States since he was 17 years of age. Count 3 charges him with stating that he became a citizen of the United States by reason of his father's naturalization, and from this affirmative evidence, it is shown that that could have happened. This man was in the United States at the age of 17 years. Under the law as it existed at that time, had his father become a naturalized citizen at any time prior to the time defendant became 21 years of age, the defendant automatically became a citizen. So, the government has failed to close that door. They have charged in count 3 of their indictment that that was one of the claims of citizenship that he made, and they have failed to come into this court and prove that Mr. De Pratu's father was not a citizen of the United States. If Mr. De Pratu's father was a citizen and became such prior to the time that Mr. De Pratu became 21, the defendant having been in the United States at that time, he automatically became a citizen of the United States. They charge

that is false, but there is no proof here that he did not become a citizen of the United States by reason of the naturalization of his father. So, there is absolutely no proof.

Mr. Nooney testified to this Court that there would be absolutely [116] no record in the Immigration and Naturalization Service of the naturalization of Mr. De Pratu had he become naturalized as a minor through derivative citizenship unless he made application for a certificate of derivative citizenship.

So, we submit to the Court that the government has failed to prove that this man is not a citizen of the United States. They might argue that they have an admission, but they do not have an admission. It is the alien registration form, which is a part of Exhibit 5 of the plaintiff, "I am a subject or citizen of, Uncertain," he writes in there, "but last of Canada." In other words, he didn't know when he made that application as to his citizenship, and apparently, not willing to run any risk, he did register because of the uncertainity in his mind as to his citizenship. There is nothing in that exhibit which shows that the defendant is not a citizen of the United States. There is nothing in the statement that has been entered from the application for registration that would cause this court to say that this man is not a citizen of the United States.

Now, the Court probably knows, it is common knowledge, that there are many people mistaken as to citizenship. I know in my work for the past 30 years on these people's applications for citizen-

ship. We have on one or two occasons, with the consent of the government, brought and prosecuted proceedings for citizenship for people we knew were citizens because there was no proof and in order that a record might be made of their [117] citizenship. So, I submit to the Court, on that one ground, having failed to show that the defendant's father or his mother did not become a citizen of the United States during the minority of this defendant, that the government has failed in its case, and my argument, repeated to the Court, is that under count 3, the government should have come here prepared to show that fact, because they state in count 3 that he claims citizenship by reason of the naturalization of his father. Now, having made that charge, it would seem to us that the government should have come into this Court prepared to show that the statement is not true, and there is absolutely no evidence before this Court as to the citizenship of Mr. De Pratu's father, and particularly during the time that this defendant was under the age of 21 years.

The Court: Well, I can go with you on a part of your argument, Mr. Davidson. I think it is sound. I think that portion of your argument where you maintain that the burden is on the government to prove that this defendant was not a citizen of the United States when he made the representation is sound. I don't have any doubt about it. But here is the question. That is the burden that is on the government as before the jury. This question now if for me to direct a verdict of acquittal, and if there

is any evidence at all in the case from which the jury could reasonably conclude that the man was not a citizen, I have no right to direct a verdict of acquittal. If the evidence [118] is in such state that the minds of reasonable men could differ, I have no right to direct a verdict, and there is admitted in evidence this exhibit, Exhibit 5, a writing signed by the defendant in which he said he was born at or near Alexandera, Ontario, Canada. That is his statement. If the jury accepts that statement as true, that establishes his citizenship right there, and establishes that he is not a citizen of the United States. Now, there is a legal presumption that a condition once shown to exist is presumed to exist as long as things of that nature exist. So, he has established himself by his statement as a citizen of a country other than the United States. Now, there is no presumption at all that I know of that one gains citizenship by reason of lengthy residence in the United States; no such presumption as that that I know of now exists. In answer to the question, "I am a citizen or subject of," he said, "Uncertain, but last of Canada." So he there again says that his last citizenshp status that he knew about was that of a Canadian. He does say, "Uncertain," which means little to my mind, and certainly it doesn't mean that he believes he is a citizen of the United States. He doesn't say there he believes he is a citizen of the United States, but is uncertain about it. He said he was uncertain about his citizenship, the last he knew about it was he was a Canadian. Of course, it is true, and in my

opinion, you are correct in your argument that if he came to this country when [119] he was 17 years old, and that is the evidence, and his father or mother came with him, and his father was thereafter naturalized, if he was under 21 years old at the time his father was naturalized, he became a citizen; but if, at the time of his father's naturalization, he was over 21 years of age, he would not become a citizen. But there is no presumption that I know of that his father came here and was naturalized. There is no presumption that he was naturalized while this man was under the age of 21 years, so as to grant to defendant the benefit of derivative citizenship through the citizenship of his father. In other words, the question is how far is the government required to go in its proof to exclude all hypotheses and all conjecture, no matter how extreme they may be. I don't think that the government, in order to make a prima facie case, is required to go to that length, is required to go to the length of showing whether the father of this defendant himself became a naturalized citizen of the United States, and further to show that if the father did become naturalized, he did not become naturalized during the minority of this defendant and while this defendant was residing in the Unite States. To me that seems to be requiring or placing a burden of proof upon the government that the government couldn't possibly be expected to assume, and particularly in view of the testimony of the inspector here that was given and stands uncontradicted that they may or may not have a record

of a minor child whose father [120] was admitted to naturalization, depending upon the record the father furnishes at the time of his admission to citizenship.

So, the motions for a directed verdict or for judgment of acquittal made orally will be denied. The motions for a judgment of acquittal made in writing and filed with the Clerk separately as to each count will be separately denied as to each of the counts. Call in the jury.

(Jury returns to Courtroom.)

The Court: Open for the defense.

Mr. Acher: May it please the Court, counsel, ladies and gentlemen of the jury, the defendant in this case expects to prove that in 1944 an application was filed with the Secretary of State of the State of Montana, and a charter was issued to the Stockman's Club, a non-profit organization, having clubrooms in Great Falls near the Northern Montana State Fair grounds. We expect to prove and it will be developed, that under the liquor and beer laws of Montana, a club is not entitled to sell beer or liquor until they have been in existence a certain number of years, one or two, I am not clear myself. The statutes say one in one place and two in another. In any event, the evidence will show that following the formation of this club as a corporation organized under the laws of Montana, a building was constructed. It took over a period of a year or more, building this building, and that about the time it was ready for [121] occupancy, application was made for beer and liquor license for this establishment.

The evidence will show that the defendant, Mr. De Pratu, had been in the restaurant and hotel business for many years at Augusta, then I believe the evidence will show he operated the restaurant in the Park Hotel, Great Falls; then he operated for many years, some eight or 10 years, a restaurant at the Stockyards where we read in the paper they sell cattle twice a week in Great Falls; and then this Club idea was conceived and carried into execution, and an application was filed for a beer and liquor license, presented through Mr. Sherman Smith, a lawyer, no relation to Paul W. Smith, attorney for the Liquor Control Board, who rejected the application on the ground that the club wasn't in existence a sufficient length of time. We expect to show that notwithstanding that fact, it was suggested a license could be issued to one of the individuals, and that without a new application a license was issued to Mr. De Pratu.

That Mr. De Pratu was not intending to represent anything about his citizenship, and that the idea of the application was for the Stockman's Club and not for Mr. De Pratu.

We expect to show that in due course, the time elapsed when the club became qualified, and that the license was transferred to and is now in the name of the Stockman's Club, a non-profit corporation.

We expect to show that Mr. De Pratu did not read these [122] printed documents, but filed them and that he had no intention to make any false representation as to his citizenship, and that, therefore, no offense is shown under the charges in the indictment.

PAUL W. SMITH

heretofore sworn, called as a witness upon behalf of the defendant, testified as follows:

Direct Examination

By Mr. Acher:

Q. Will you state your name, please?

A. Paul W. Smith.

Q. You are the same Paul W. Smith who heretofore testified on the part of the government in this case? A. Yes.

Q. Mr. Smith, showing you defendant's, or rather plaintiff's Exhibit No. 2, I will ask you whether or not that was presented to you as the attorney for the Montana Liquor Control Board on or shortly prior to February 16, 1946?

A. Yes, it was.

Q. Were you requested to advise the Board as to whether or not a license could be issued?

Mr. Pease: If the Court please, I would like to interpose an objection to the line of testimony which has been outlined in counsel's opening statement for the defendant, both as to the testimony of this witness and any others in the same subject matter on the ground that the same does not constitute a defense and that the same is irrelevant to the issues of the cause, and incompetent to establish any defense to the action.

The Court: Well, I listened to the opening statement. It may be a question as to whether or not it establishes a defense. Still, there is a question of intent involved here, and it may be competent

(Testimony of Paul W. Smith.)

on the question of intent, and of course if the defendant, on that question of intent, desires to establish the fact that he entered into a conspiracy to violate the laws of the State of Montana, there may be some materiality in that. I think I will overrule the objection. That seems to be what the evidence will establish.

Mr. Acher: If you will answer the question, please.

A. Yes, I was requested to advise the Board.

Q. And what action did you take in connection with the application?

The Court: Of course, I think if you ask for conversation, it is hearsay unless the defendant was present.

Mr. Pease: Action, I presume, means official action and the expression of an opinion or something of that kind?

Mr. Acher: That's right.

The Court: So, if you gave an opinion, witness, or something of that kind, you may so state without stating what the opinion was.

A. Yes, I gave an opinion relative to the application which I [124] hold, plaintiff's Exhibit 2.

Q. And what was that opinion?

Mr. Pease: Objected to until it is shown whether in writing or oral.

Q. Was it oral or in writing?

A. It was oral.

The Court: Isn't this hearsay? Was the defendant present when the opinion was given?

(Testimony of Paul W. Smith.)

Mr. Acher: If the defendant asks for hearsay, can the other side object?

The Court: Yes, certainly, hearsay isn't competent no matter who asks for it. Cases are tried by competent evidence, and hearsay isn't competent evidence.

Mr. Acher: We expect to show negotiations with the lawyer for the defendant.

The Court: You haven't shown anything like that.

Mr. Acher: I was leading up to it. Did you have any dealings directly with Mr. De Pratu about this matter personally?

A. Not directly with De Pratu.

Q. Did you have any dealings with anyone purporting to represent him?

A. Yes, Sherman W. Smith, attorney in Helena.

Q. Tell briefly what the negotiations were, what the result was.

Mr. Pease: Objected to on the ground there is no foundation [125] laid showing the purported authority or the extent thereof of Mr. Sherman Smith.

The Court: Sustained.

Q. Did you know Mr. Smith and know that he was acting as attorney for the defendant, Mr. De Pratu?

Mr. Pease: Objected to as calling for an opinion.

Mr. Acher: He is an attorney licensed to practice.

The Court: He was an attorney licensed to practice, but being licensed to practice doesn't license

(Testimony of Paul W. Smith.)

you to represent someone. I am going to overrule the objection because apparently you are asking if the man knows of his own knowledge whether Sherman Smith represented this man.

A. Yes. Sherman Smith filed the application with the Board himself.

Q. And, now, what advice, or I mean, what decision did you communicate to Mr. Sherman W. Smith as to whether a license would be granted, or whether it wouldn't? Tell it in your own way.

A. I told Sherman Smith and also Mr. Buley, who was administrator for the Board that the Stockman's Club could not hold a liquor license because it had not been organized prior to two years before making application to the Board, which was the Montana law.

Q. In your consideration of this application was it deemed an application of De Pratu individually or an application of the [126] Stockman's Club?

Mr. Pease: To which we object on the ground it is not the best evidence, it calls for the opinion of the witness, and it calls in effect for an interpretation of official action, of which there must be some record and which record must be the best evidence.

The Court: Yes, sustained. It is an invasion of the province of the jury. It is an exhibit in evidence, and it is for the jury to say whether it is an application made by De Pratu or the Stockman's Club. It is a question for them to decide, not for a witness on the witness stand.

(Testimony of Paul W. Smith.)

Mr. Acher: At this time, I think I have laid the foundation and we would like to offer in evidence defendant's Exhibit 4, which I believe the testimony shows was presented simultaneously with Exhibit 2.

Mr. Pease: Objection, the same objection to the offered exhibit as was heretofore made to it, that is to say, on the same grounds, and specifically on the ground that it is not relevant or material to the issues of this cause, having to do with and being a separate application for a different type of license and not a part of the transaction which is charged in the indictment.

The Courts: Let me see the offered exhibit. Well, this transaction was not mentioned in the indictment at all. It seems to me if it was admitted it would constitute but an encumbrance on [127] the record. I fail to see where it has any bearing on the case here or where it is material in any respect at all. It is an application for a beer license, apparently on a regular state form. I don't consider it material. It is an encumbrance on the record. The objection will be sustained.

(Defendant's Exhibit 4, being an application for a Retail Beer License to the Montana Liquor Control Board by L. P. De Pratu dated January 15, 1946, was here refused admission in evidence. The same will be certified to the Circuit Court of Appeals by the Clerk.)

#6747 - USV Louis R. DePratu

Lyle Ex 4 (not admitted)

14

Cascade

(County in which license is to be used).

DO NOT SEND PERSONAL CHECK
Make Separate Remittance for Each Fee

Cash Item No.

Beer License No. R 12-12

FEE $200.00

Montana Liquor Control Board

HELENA, MONTANA

Liquor License No. B. L. L. 197

Application for Retail Beer License

Application must be completely filled out and sworn to before a Notary Public or other person authorized to administer oaths. The statutory fee must accompany this application and will be returned if the Board shall find that the undersigned is, or are, not qualified.

L. P. DePratu

(Full names of all applicants for this license. Please print or type).

The Stockman's Club

(Trade name which applicant or applicants intend to call such business).

619 - 2nd Street Northwest, Great Falls, Montana

(Location by street and number and city or town of the the premises where the business is to be carried on under the license, if issued.)

TO MONTANA LIQUOR CONTROL BOARD:

The undersigned, desiring to possess and have for sale beer, under the provisions of Montana Beer Act for the purpose of selling it at retail, hereby apply to you for a license so to do and tender with this application the license fee provided for. In support of this application, and in order to show the qualifications of the undersigned to be issued such license, that is to say, that the undersigned is, or are, of good moral character, and is a law abiding person, or are law abiding persons, and is a fit and proper person, or are fit and proper persons, to sell beer, EACH FOR HIMSELF OR HERSELF gives the following information and makes the following statements:

(a) That the undersigned is over the age of twenty-one years;
(b) That the undersigned is not the keeper of a house of ill fame;
(c) That the undersigned has never been convicted of being the keeper of a house of ill fame;
(d) That the undersigned has never been convicted, either under the laws of the federal government or of the State of Montana, of pandering;
(e) Have you ever been convicted, either under the laws of the federal government or of the State of Montana, of any other crime or misdemeanor? (Answer "yes" or "no") No
(f) If you have answered "yes" to the last preceding question, give the particulars of such crime or misdemeanor.
(g) Has ever any license to sell beer at retail, issued under the Montana Beer Act to you, or in which you were interested as a partner, been revoked for cause? (Answer "yes" or "no") No
(h) Are the premises for which such license is sought inside of the boundaries of an incorporated city or town? (Answer "yes" or "no") Yes;
(i) That the Board or any member thereof, or its duly authorized representative, or any peace officer of this state shall have the right at any time, and is hereby given the authority, to make an examination of the premises of the undersigned and to check the books, records and stock in trade of the undersigned and to take an inventory thereof and in the event any beer or liquor is found which is being kept or held in violation of the law, he may immediately seize and remove the same;
(j) That the undersigned, or his or her employee or employees, will not sell, deliver or give away, or cause or permit to be sold, delivered or given away, any beer to any person under the age of 21 years;
(k) That if the undersigned is granted the license applied for, the undersigned will abide by all rules and regulations of the Board relating to the "Montana Beer Act," and will not violate any law of the United States, or of the State of Montana, or any legal city ordinance relating to beer or intoxicating liquor, and will not knowingly permit any agent or employee so to do, it being the express understanding that violation of any rule or regulation of said Board, or of any city ordinance relating to beer or intoxicating liquor by the undersigned, or any of the same, or of any agent or employee of the undersigned, shall be sufficient grounds for the revocation or suspension of the license herein applied for.

Dated at Great Falls, Montana this 15th day of January, 1946

L. P. DePratu

(Signatures of all Applicants)

STATE OF MONTANA
COUNTY OF Cascade } ss.

L. P. DePratu

(Names of All Applicants)

being first duly sworn, each for himself, or herself, deposes and says: that he, or she, has read the foregoing application and knows the contents thereof; and that the same is true to the knowledge of deponent.

L. P. DePratu

(Signatures of All Applicants).

Subscribed and sworn to before me this 15th day of January, 1946

[illegible]
Notary Public for the State of Montana.
Residing at Great Falls, Montana.
My Commission expires Oct. 20, 1948

NPM'o A-4724

(Testimony of Paul W. Smith)

Q. (By Mr. Acher): I will show you defendant's proposed Exhibit 3—I am not sure whether the record shows or not—but I will ask you whether or not that application was submitted with and as a part of the same transaction as plaintiff's Exhibit 1?

Mr. Pease: That is objected to on the ground that the exhibits themselves referred to, both 1 and 3, on their face show they are not a part of the same transaction, but are distinct instruments and have a distinct character.

The Court: I will sustain the objection as it calls for the opinion of the witness on a question of law and fact, and that is whether or not it was done as part of the same transaction. If it were material, it would be a question for the jury to decide.

Mr. Acher: Mr. Smith testified that he handles these matters, and that is what I was relating to.

The Court: That isn't what your question was. It was a compound [128] question asked him, whether or not it was filed with the other application and as a part of the same transaction, and it calls for his conclusion of law and fact on the next question of whether the two instruments constitute part of the same transaction.

Q. (By Mr. Acher): Mr. Smith, was defendant's Exhibit 3 filed at the same time as plaintiff's Exhibit 1? A. Yes.

Q. And were licenses—state whether or not licenses were issued simultaneously on the two applications.

(Testimony of Paul W. Smith.)

Mr. Angland: To which we object, your Honor. It is immaterial, has no probative value in this cause.

Mr. Acher: I am merely trying to lay the foundation to offer this exhibit.

The Court: Well, I don't think that what was done thereafter constitutes any part of the foundation, Mr. Acher. In my opinion, if from your theory, you haven't laid the foundation now, you couldn't fortify it any by showing whether licenses were or were not issued. The question here before the jury is the representation that was made in the written application, not what was done after. Whether the representation was acted on or not is not highly material in my opinion. The gist of the offense here was the writing contained in the application, the statement he made, and the truth of that statement.

Mr. Acher: I want the record to be clear that these two [129] applications were received by the Liquor Control Board simultaneously.

The Court: He said they were filed together, what more can the record show?

Mr. Acher: We offer in evidence defendant's Exhibit 3.

Mr. Pease: Same objection as heretofore made to Exhibit 4, namely that the same is irrelevant to the issues of the cause, pertains to a different transaction, does not tend to establish any defense to the charge contained in the indictment.

(Testimony of Paul W. Smith.)

The Court: Well, ladies and gentlemen, I must ask you to retire again.

(Jury retires from Courtroom.)

The Court: Where do you deem this material, Mr. Acher?

Mr. Acher: It says that this application is made by a corporation, that form states that, and I thought it would be corroborative of the evidence we will have which indicates that this man intended these applications to be for a club, and the fact that the Liquor Control Board issued it to him would not make him retroactively guilty of a crime. It is a question of his knowingly doing something. The other application is ambiguous. You will note that it says the application is not made for an individual, it is made for a president, by the president and manager; and in connection with motive, we expect to show that there are three incorporators, two, citizens without question; [130] that after this trouble arose, the license was transferred to one of the other incorporators until such time as this club had been in existence the requisite period, when the license was actually issued to and is now held by the club. We submit that the whole crux of this lawsuit is knowingly and falsely, whether or not the actions were done knowingly and falsely, and the jury has a right to consider the application made, and if it is ambiguous, and to determine whether this man read it and knew what he was signing. I know that in examining papers for other

people, I read them very carefully, but I have gone places and signed papers without reading them for myself, and I think the jury may have a right—(interrupted)

The Court: They may have a right, but they are certainly going to be charged that he is held to the same degree of responsibility as if he had read them. These papers are not idle forms, and if an individual makes an application to the state in which these questions are asked him and if there is a fact falsified, because they are printed and he did not read it, it will not excuse him. The jury is going to be charged in this case that he is held to the same degree of responsibility as though he did read it and knew what he was signing.

Mr. Acher: That may be true, your Honor. The answer could be true. He could construe it in that way. In the first question, "State in what capacity you make this application," he answered, "president and manager." [131]

The Court: That is your argument as to the construction of the liquor license. I am frank to say that the argument does not appeal to me; you are wasting your time making it to me, but I can't say as to the jury. I am inclined to think in his offer of this document that counsel is correct, Mr. Pease, in his argument that he has made to me that this goes to the question of intent. In other words, I believe that evidence should be received on that question. The indictment charges that this was done knowingly, falsely and feloniously. The word

"feloniously" simply defines the degree of the offense; in other words, it constitutes a felony rather than a misdemeanor. That is the only significance of that word. But this is a question of intent, of the falsity of the statement in the indictment, that it was done falsely. Now, that certainly means untruthfully, that it was untruthful; that means not only it was untruthful, but it means that the defendant knew at the time what the truth was. That is the import of that language. If the statement was made through inadvertence, negligence or carelessness, I don't know that a conviction would be justified.

Mr. Pease: The objection was, your Honor, it didn't have any tendency to prove a lack of knowledge or lack of intent. It seems to me to be on a different plane from this document here in which the representation of citizenship is contained.

The Court: Well, of course, there is no representation of citizenship in this application for a retail license for beer [132] at all.

Mr. Pease: That's right. He might have signed thousands of documents in which he made no such representation which would be immaterial and irrelevant to this issue here. That's what strikes me at the outset. He didn't have to say anything about citizenship in that one.

The Court: That is true. If a man knowingly and falsely makes a false statement in one instrument, it wouldn't be a defense to it no matter how

many instruments he made in which he didn't make it.

Mr. Acher: There is one other point. The one application, the June application, in answer to question 5, it says, "If a corporation, has the corporation been organized and doing business in Montana for 5 years," which would indicate if this was an individual, there wouldn't be any answer to put in there.

The Court: But many individuals would think it meant, "Are you applying on behalf of a corporation," and say no. Different constructions can be placed on it.

Mr. Pease: It seems also to me, your Honor, to be of importance here that this whole line of attempted defense seeks to impeach, is an attempted impeachment of the very instrument which he did sign, and which apparently he is going to admit he did sign, naming the Stockman's Club in answer to the question, "What is the trade name which the applicant intends to call such business." He had a competent attorney representing and [133] advising him at that time. And this, "the full names of all applicants for this license"—not the applicant, but all applicants for this license. That is under the first dotted line which has the name L. P. De Pratu typed upon it. So, it seems to me they are getting to a point of contradiction.

The Court: Well, that is what I think, too, but then on the other hand, that is the reason I sustained the objection to Exhibit 4. There is no such

language in proposed Exhibit 4 as there is in the proposed Exhibit 3. Here the question is, "State in what capacity you make this application." He says, "Corporation," that is typewritten in. There is no such question or answer at all contained in Exhibit 4, as I view it. On the other hand, here is a man who makes an application signed by himself to be permitted to sell liquor, he wants a license for that purpose. Under the law of the state, it is necessary for him to apply for a license to sell beer. In other words, if he doesn't have a beer license, he cannot obtain a liquor license, as I understand it. So, this beer application was made out at the same time as the liquor application. I don't think that either one is a part of the other, but one was in furtherance of the other. They were sent out at the same time, they were certified at the same time, and certainly it appears to me the only reasonable construction which could be placed on the two applications is that the same applicant, be it corporation or individual, was applying for both licenses. And so, in this [134] paper, in this application that was made in point of time coincidental with the liquor license application there is the statement, "State in what capacity you make this application," answer, "Corporation." Well, of course, that to me, I see no particular significance to it, particularly under the statement of counsel for the defendant here that this man has been in the United States for years, he has been a business man and operated a business; he has done those things; he is a man of intelligence

and knows something about business and business forms. Now, it seems to me, that anybody with that experience would know if a corporation submits an application, it is made in the corporate name, signed by the corporate officers and the seal of the corporation is attached; it isn't made in an individual's name and signed by the individual with no designation at all. In addition to that, the evidence so far apparently discloses it was done with the advice and guidance of an attorney, an able attorney. I know Mr. Smith, Mr. Sherman W. Smith, and know his ability, and I don't think, if that is true, any such confusion should have crept into these instruments; but still it gets back to this question of intent. I say that is the construction I would place on it. However, I think the jury might disagree with me, and it is within their province. I don't know that they would, but I think it is within their province. I don't know of any question in the trial of a criminal case that is more peculiarly a jury question than the question [135] of intent, and I think the Court should, where that question is involved, as it is here, should be somewhat liberal in permitting evidence on that question to go to the jury. After all, this is the defendant's side of the story, and while I say it may not impress me, it may impress the jury, I don't know. He should have the opportunity to tell it to them. So, the objection will be overruled and it will be admitted in evidence simply and purely as to the question of the intent of the defendant.

(Jury returns to Courtroom.)

(Testimony of Paul W. Smith.)

Q. (By Mr. Acher): Mr. Smith, do you have with you the records of the licenses which were issued pursuant to the applications, plaintiff's Exhibits 1 and 2?

A. You mean the licenses issued?

Q. The records. I think the government brought out that they were issued. Will you refer to your records and see whether or not the licenses were transferred and, if so, the date of the transfer and to whom?

Mr. Acher: It just came to my attention, your Honor, that Exhibit 3 was offered and the Court admitted it and it hasn't been read. Could I have leave to read it at this time?

(Defendant's Exhibit 3, being an application for a Retail Beer License made to the Montana Liquor Control Board by L. P. De Pratu, dated June 27, 1946, was received in evidence and here read to the jury. The same will be certified to the Circuit Court of Appeals by the Clerk.)

#6747 - US v Louis R. DePratu
Defts' Ex 3 (admitted)

15

Form 702—4M—4-46

FISCAL YEAR
1946
July 1, 1945 to June 30, 1947

(DO NOT USE THIS SPACE)
Cash Item No. .....
Beer License R. No. 1170
Liquor License R.L.L. No. 1114

.....
(County in which license is to be used.)

FEE $200.00

Montana Liquor Control Board
HELENA, MONTANA

Application for Retail Beer License

Application must be completely filled out and sworn to before a Notary Public or other person authorized to administer oaths. The statutory fee must accompany this application and will be returned if the Board shall find that the undersigned is, or are, not qualified.

L. P. DE PRATU
(Full names of all applicants for this license. Please print or type.)

THE STOCKMAN'S CLUB.
(Trade name which applicant, or applicants, intend to call such business.)

619 3d street N. W. Great Falls, Montana
(Location by street and number and city or town of the premises where the business is to be carried on under the license, if issued.)

TO MONTANA LIQUOR CONTROL BOARD:

I hereby apply for a Retail Beer License and under oath make the following statements and answer the following questions, to-wit:

(a) State in what capacity you make this application.
CORPORATION
(State whether owner, partner, or if corporation, state your office, or in any other capacity.)

(b) If a partnership or other joint venture, give the names of all interested parties.

(c) Are you over the age of twenty-one years? Yes

(d) Are you a keeper of a house of ill fame? No

(e) Have you ever been convicted of being the keeper of a house of ill fame? No

(f) Have you ever been convicted, either under the laws of the federal government or the state of Montana, of pandering or other crime or misdemeanor opposed to decency and morality? No

(g) Have you ever been convicted for violation of any law or ordinance relative to sale of liquor or beer? No

(h) If you have answered "yes" to the two last preceding questions, state the particular offense, date, court and place of conviction.....

(i) Has any license to sell beer at retail issued under the Montana Beer Act to you, or in which you were interested as a partner or otherwise, ever been revoked? No

(j) Are any brewers and/or wholesalers of beer interested either financially or otherwise, directly or indirectly, by leasing or furnishing any premises, furniture, fixtures, equipment or other property in the conduct or operation of your business? No

(k) Are the premises for which such license is sought inside the boundaries of an incorporated city or town? Yes

(l) That the Board or any member thereof, or its duly authorized representative, or any peace officer of this state shall have the right at any time, and is hereby given authority, to make an examination of the premises of the undersigned and to check the books, records and stock in trade of the undersigned and to take an inventory thereof and in the event any beer or liquor is found which is being kept or held in violation of the law, he may immediately sieze and remove the same;

(m) That the undersigned, or his or her employee or employees, will not sell, deliver or give away, or cause or permit to be sold, delivered or given away, any beer to any person under the age of 21 years;

(n) That if the undersigned is granted the license applied for, the undersigned will abide by all rules and regulations of the Board relating to the "Montana Beer Act", and will not violate any law of the United States, or of the State of Montana, or any legal city ordinance relating to beer or intoxicating liquor, and will not knowingly permit any agent or employee so to do, it being the express understanding that violation of any rule or regulation of said Board, or of any city ordinance relating to beer or intoxicating liquor by the undersigned, or of any agent or employee of the undersigned, shall be sufficient grounds for the revocation or suspension of the license herein applied for.

Dated at Great Falls, Montana, this 27th day of June, 1946.

L. P. DePratu
(Signatures of All Applicants)

STATE OF MONTANA, } ss.
COUNTY OF Cascade }

L. P. DePratu
(Names of All Applicants)

being first duly sworn, each for himself, or herself, deposes and says: That he, or she, has read the foregoing application and knows the contents thereof; and that the same is true to the knowledge of deponent.

L. P. DePratu
(Signatures of All Applicants)

Subscribed and sworn to before me this 27th day of June, 1946.

Wm. Morel
Notary Public for the State of Montana,
Residing at Great Falls, Montana.
My Commission expires 2/15/48

MAKE SEPARATE REMITTANCE FOR EACH APPLICATION

REMITTANCES MUST BE BY BANK DRAFT, MONEY ORDER OR EXPRESS ORDER. PERSONAL CHECKS WILL NOT BE ACCEPTED.

(Testimony of Paul W. Smith.)

(Question read by the reporter.)

A. I have an assignment from L. P. De Pratu to Louella Lundby for retail liquor license No. 1170, or rather retail beer license No. 1170 and retail liquor license No. 1064.

Q. That is the liquor license referred to on plaintiff's Exhibit 1? A. Yes, it is.

Q. What is the date of that assignment?

A. The date of the assignment is October 3, 1946.

Q. Then, Mr. Smith, can you trace the history of the license for that place from Miss Lundby? How long did it stand in her name and then to whom was it transferred?

Mr. Angland: To which we object, your Honor——

The Court: Sustained.

Mr. Acher: It is on the question of motive, your Honor, to show the club now has said license.

The Court: The evidence here shows that he transferred it out of his name to the other. What difference does it make what the other did with it?

Mr. Acher: We will follow it up by showing that the club and the club members—(interrupted)

The Court: That doesn't make any difference. If the club got the license, it got it through another individual than this defendant. [137]

Defendant's Offer of Proof No. 6

We offer to prove that the license was later transferred from Miss Lundby to the Stockman's Club on February 5, 1947.

Mr. Pease: The government objects to the offer of proof numbered 6 handed to me on the ground that the same is irrelevant and immaterial and does not tend to prove any defense to the charge in the indictment, and specifically that it is a subsequent transaction and can have no bearing on the motive, intent or anything else or any other element of the offense charged in the indictment.

The Court: The offer of proof will be numbered consecutively and the objection will be sustained.

Mr. Acher: You may cross-examine.

Mr. Pease: No cross-examination.

(Witness excused.)

EMMA LUNDBY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Acher:

Q. Will you state your name, please?

A. Emma Lundby.

Q. Where do you live, Miss Lundby?

A. At Great Falls, Montana. [138]

Q. How long have you known the defendant, Mr. De Pratu? A. Just about 20 years.

(Testimony of Emma Lundby.)

Q. And have you been associated with him in business? A. Yes, sir.

Q. For how long? A. The same time.

Q. Do you have a relative who has likewise been associated in business with Mr. De Pratu?

A. Yes, a sister.

Q. What is her name?

A. Louella Lundby.

Q. And briefly, what has been—what is your business at the present time?

A. At the Stockman's Club.

Q. You and your sister and Mr. De Pratu all are officers of the Stockman's Club?

A. Yes, sir.

Mr. Acher: At this time, the defense offers in evidence as proposed Exhibit 8 a certified copy of the charter of the Stockman's Club, a Montana corporation, and as Exhibit 9, the Articles of Incorporation of the Club, which are filed in the office of the Secretary of State.

Mr. Pease: The offers are both objected to on the ground they are irrelevant to the issues of the case, your Honor.

The Court: Well, Exhibit 8 may have some bearing on the question [139] of intent here. The objection will be overruled and the exhibit will be admitted in evidence. It seems to me Exhibit 9 would be somewhat of an encumbrance of the record. Mr. Acher, is there anything in the by-laws you intend to rely on or you think of any importance here?

(Testimony of Emma Lundby.)

Mr. Acher: No, your Honor, it was simply to show there was a corporation, and I didn't know whether the certificate would be enough to establish that. It isn't the by-laws, it is the articles of incorporation.

The Court: I think the certificate of the Secretary of State certifying that articles of incorporation has been filed in his office and that such association is a body corporate and politic and authorized to do business in the State of Montana is sufficient to establish the corporation's existence.

Mr. Acher: I will withdraw the offer of Exhibit 9 at this time.

Court: Very well.

(Defendant's Exhibit 8 was here received in evidence, was read to the jury, and is as follows:)

1st Page

"Department of the Secretary of State of the State of Montana

I, Sam W. Mitchell, Secretary of State of the State of Montana, do hereby certify that the annexed is a full, true and correct copy of the original Certificate of [140] Incorporation issued to

The Stockman's Club

by this Department on the fourteenth day of October, A.D. 1944.

In Witness Whereof, I have hereunto set my hand and affixed the Great Seal of the State

of Montana, at Helena, the Capital, this sixth day of January, A.D. 1948.

(Great Seal of the State of Montana.)

/s/ SAM W. MITCHELL,
Secretary of State."

2nd Page

"Department of the Secretary of State of the State of Montana

Be It Known That the Stockman's Club

In accordance with the provisions of Chapter 42 of the Civil Code of Montana of 1935, as amended, has caused to be filed in the office of the Secretary of State of the State of Montana a certified copy of its Articles of Incorporation on the fourteenth day of October, A.D. 1944.

Now, Therefore, I, Sam W. Mitchell, Secretary of State of the State of Montana, do hereby certify that a certified copy of Articles of Incorporation of

The Stockman's Club

containing the required statement of facts prescribed by said Code, as amended, having been filed in this office, such Association is a body corporate and politic and is authorized to do business in the State of Montana, with continual succession.

Witness my hand and the Great Seal of the State of Montana hereunto affixed this fourteenth day of October, A.D. 1944.

(Great Seal)

SAM W. MITCHELL,
Secretary of State.
By CLIFFORD L. WALKER,
Deputy.

DCM.10"

Q. (By Mr. Acher): Miss Lundby, are you one of the three original incorporators of the Stockman's Club?

A. Yes, I am the treasurer and the secretary.

Q. Do you have with you the original minute book of the corporation? A. Yes, sir.

Q. I will ask you, Miss Lundby, whether or not this book which you have here before you is the original minute book of the Stockman's Club, a corporation? A. Yes, sir.

Q. I will ask you whether or not the minutes which are kept in this book were either written by you or written under your [142] direction and by you filed as Secretary of the corporation.

A. They were written under my direction.

Q. Showing you proposed Exhibits 10 to 16, inclusive, I will ask you whether or not they are the official and original minutes of the meetings of the corporation—it should be Exhibits 11 to 16, inclusive, are the minutes of the corporation from its incorporation to and including December 15, 1945?

A. Yes, they are the originals.

(Testimony of Emma Lundby)

Q. I will ask you whether or not Defendant's Exhibit 10 is the minutes of the meeting held prior to the formation of the corporation, which resulted in the articles being drawn and the charter being issued? A. I didn't get that question.

(Question read by the reporter.)

A. Yes, sir.

Q. Showing you proposed Exhibit No. 17, I will ask you whether or not,—that is 17 and 18 jointly—that is the heading of the minutes of a meeting held on Wednesday, February 20, 1946, showing who were present at the meeting and a portion of the proceedings held at that meeting?

A. Yes, sir.

Mr. Acher: We now offer in evidence defendant's proposed Exhibit No. 15 first. That is the meeting of September 1, 1945.

The Court: Is there any objection?

Mr. Pease: Yes, your Honor, we object to the exhibit. It [143] seems to be in its entirety a narrative of proposed doings of the corporation and does not tend to show any material facts, any facts material to this case. It is, as to the defendant in this case, wherever it may be considered material, self-serving. It seems to me it would be an encumbrance on the record.

Mr. Acher: It is prior to the alleged commission of the offense.

The Court: It purports to be a meeting of the Board of Directors of a corporation that wasn't in existence at the time the meeting was held.

Mr. Acher: Yes, sir, your Honor. The corporation was formed in 1944.

The Court: That's right. Well, to the extent of the writing on the exhibit that I have enclosed in brackets, the objection is sustained. As to the balance that is not enclosed in brackets the objection will be overruled and the exhibit will be received in evidence.

(Defendant's Exhibit 15 was here received in evidence, was read to the jury, and is as follows:)

"Minutes of Regular Meeting of Board of Directors of Stockman's Club Held on Saturday, the 1st Day of September, 1945.

At the regular meeting of the Board of Directors of The Stockman's Club held in the City of Great Falls, Montana on Saturday, the 1st day of September, 1945, in accordance with the By-Laws of said Stockman's Club, there were present, Luella Lundby whose term expired as Vice-President; Emma Lundby, whose term expired as Secretary-Treasurer, and L. P. De Pratu, whose term expired as President and Manager of said corporation.

Upon motion duly made and seconded, and carried L. P. De Pratu was re-elected Director and President and Manager of said corporation.

Upon motion duly made and seconded and carried, Luella Lundby was re-elected Director and Vice-President of said corporation.

Upon motion duly made, seconded and carried, Emma Lundby was duly re-elected Director and Secretary-Treasurer of said corporation, all of said officers to hold office until the next annual meeting in September of 1946, unless a vacancy existed in accordance with law.

(Thereafter, L. P. De Pratu advised the other Directors of said corporation that said Stockman's Club was indebted to him in the amount approximating $20,000.00. The said L. P. De Patru thereupon advised the Directors that he did not care for any collateral or security to secure him for said money expended at that time, and that he would wait until some future time when he could advise the board of the exact amount of money which he had personally expended in the construction of said building.) The said L. P. De Pratu, thereupon offered to obtain slot machine licenses in accordance with the laws of the State of Montana and beer and liquor licenses for said establishment in accordance with the laws of the State of Montana and to pay for same personally, providing he would be secured at some future date for said expenditure.

Upon motion duly made, seconded and carried, the said L. P. De Pratu was thereupon directed to obtain said licenses as above set forth.

There being no further business before the meeting, upon motion duly made, seconded and carried said meeting was duly adjourned.

L. P. DE PATRU.
EMMA LUNDBY,
Secretary."

(The portion of the above exhibit enclosed in parentheses was refused admission in evidence and was not read to the jury.)

Mr. Acher: We offer in evidence defendant's proposed Exhibit [145] 17 and 18. No. 17 is just excerpts from the meeting of February 20, 1946. They should have been really marked as one exhibit, I guess. One is merely to give the date.

The Court: Is there any objection to the offer?

Mr. Pease: The same objection as to the last exhibit, your Honor, that the same does not tend to establish any defense or any element of the defense.

The Court: It looks to me as though there is merit in that. The main part of the exhibit is a report that the defendant made to the Board of Directors of this corporation. That is a self-serving declaration. As to whether or not the licenses were obtained, if they were obtained, the licenses themselves are the best evidence. Apparently, under the testimony as it has developed to this point, and from the opening statement of counsel for the defendant, any such report made as was purported to be made by the defendant to the Board of Directors of the

corporation was false as he had not done the things he said he did do. The licenses themselves are the best evidence. The objection will be sustained.

(Exhibits 17 and 18, offered by the defendant, were here denied admission in evidence, and are as follows:)

Exhibit 17

"Minutes of Special Meeting of Board of Directors of the Stockman's Club, Held on Wednesday, February 20th, 1946

Pursuant to law and waiver of notice heretofore made, [146] there were present Emma Lundby, Louella Lundby and L. P. De Pratu in the clubhouse of said club in the City of Great Falls on Wednesday, February 20th, 1946."

Exhibit 18

"Whereupon, L. P. De Pratu reported to the meeting that he had duly obtained slot machine licenses for the operation of eight slot machines, a State liquor license, a State beer license, a Cascade County liquor license, a Cascade County beer license, a City of Great Falls liquor license and a city of Great Falls beer license, together with the United States Government federal excise tax stamps and all of the necessary licenses issued by the State of Montana to operate a restaurant in connection with said club.

(Testimony of Emma Lundby)

Thereupon, by motion duly made, seconded and carried the meeting confirmed all of the acts and actions of the said L. P. De Pratu.

L. P. DE PRATU,
President.
EMMA LUNDBY,
Secretary."

Mr. Acher: We offer in evidence proposed Exhibit 10, being minutes of meeting of the 17th of June, 1944.

The Court: Any objection to that?

Mr. Pease: Yes, your Honor, we object to this on the ground that it is not an act of the corporation in question. It is apparently a form of agreement between parties intending to form a corporation and is superseded by the articles of incorporation, by the charter, and I don't suppose it is binding either upon the corporation or upon the government, or anybody except the persons who participated.

Mr. Acher: I thought it would shorten the record. I said I would withdraw Exhibit 9—(interrupted) [147]

The Court: I see no similarity at all between this exhibit and the articles of incorporation.

Mr. Acher: I think the non-profit club statute—I think the way you form it is by passing a resolution.

The Court: I am going to sustain the objection to Exhibit 10. It is completely and entirely imma-

(Testimony of Emma Lundby)

terial in my opinion to any issue here in this case. Objection sustained.

(Defendant's Exhibit 10 was here denied admission in evidence and is as follows:)

Exhibit 10

"On this 17th day of June, 1944, in the City of Great Falls, Montana, at a meeting called by L. P. De Pratu there were present: Emma Lundby, Louella Lundby and L. P. De Pratu.

L. P. De Pratu was elected temporary chairman and after discussing, and upon motion of Emma Lundby duly seconded by Louella Lundby, it was voted unanimously by those present that they would employ counsel, to wit: Sherman W. Smith, Esq., of Helena, Montana, to form a non-profit organization to be known as The Stockman's Club and to file articles of incorporation thereof in conformity with the laws of the State of Montana and to obtain a charter therefor.

There being no further business before the meeting, upon motion duly made and seconded and after the election of Emma Lundby by motion duly made and carried as Secretary of the meeting, the meeting was duly adjourned.

L. P. DE PRATU,
Chairman.
EMMA LUNDBY,
Secretary."

Mr. Acher: We will then offer Exhibit 11 which is the minutes of October 16, 1944.

(Testimony of Emma Lundby)

The Court: Do you have any objection to this?

Mr. Pease: Yes, your Honor, the exhibit is objected to in its entirety as immaterial to the issues of the case. There seems to be nothing in it at all about any licenses or proposed licenses or anything at all upon the subject matter of this case.

The Court: The objection will be sustained as to that portion of the minutes that I have enclosed in brackets. It will be overruled as to that portion that is not enclosed in brackets. The only thing I have left in is the election of officers. It is material to show who the officers of the corporation were.

(Defendant's Exhibit 11, which was admitted in evidence in part is as follows:)

Exhibit 11

"Minutes of the First Meeting of the Stockman's Club, Held in the City of Great Falls, Montana, on the 16th Day of October, 1944.

There being present all of the incorporators of said club, to wit: Emma Lundby, Louella Lundby and L. P. De Pratu, the following business was transacted:

(L. P. De Pratu reported to the meeting that a charter had been duly granted by the State of Montana after the original Articles of Incorporation were duly filed in the office of the County Clerk and Recorder of Cascade County, Montana, and a certified copy thereof was filed in the office of the Secretary of State of the State of Montana. L. P. De Pratu reported that

(Testimony of Emma Lundby)

he had paid Sherman W. Smith the filing fees and the attorneys fees for obtaining said charters. Thereupon, L. P. De Pratu was named as the Temporary Chairman and he called the meeting to order for the purpose of electing officers of said corporation.)

Upon motion of Emma Lundby, duly seconded by Louella Lundby, L. P. De Pratu was elected President and Manager of said corporation.

Upon motion of Emma Lundby and duly seconded by L. P. [149] De Pratu, Louella Lundby, by unanimous vote, was elected Vice-President of said corporation.

Upon motion of Louella Lundby and duly seconded by L. P. De Pratu, Emma Lundby was unanimously elected Secretary-Treasurer of said corporation.

Thereupon the officers just elected took their places and L. P. De Pratu presided over said meeting as President of said corporation. Thereupon, by motion duly made, seconded and unanimously carried, Emma Lundby, Louella Lundby and L. P. De Pratu were elected as directors of said corporation.

(Thereafter, L. P. De Pratu reported to the corporation as to his plans for building and completing a clubhouse to be the headquarters of said club and in which would be carried on the social activities of said corporation club and the membership thereof.)

(Testimony of Emma Lundby)

(Thereupon, upon motion duly made by Louella Lundby and seconded by Emma Lundby, L. P. De Pratu was authorized to proceed and to do everything necessary to build and to complete the clubhouse to house the activities of said club and its membership and to create indebtedness personally for the completion of said clubhouse with the understanding that at some future date an accounting would be made to said corporation by the said L. P. De Pratu and said corporation would then make arrangements to secure the said L. P. De Pratu for any and all sums expended by him in building and completing said clubhouse.)

There being no further business before the meeting, upon motion duly made, seconded and carried said meeting was duly adjourned.

L. P. DE PRATU,
President.
EMMA LUNDBY,
Secretary."

(The portions of the above exhibit enclosed in parentheses was refused admission in evidence and was not read to the jury.)

Mr. Acher: We offer in evidence defendant's Exhibit 12, proposed Exhibit 12. [150]

Mr. Pease: January 4th?

Mr. Acher: January 4, 1945. The rest of them, your Honor, go to trace the history.

The Court: Exhibit 12 will not be admitted. It is so apparently immaterial it looks to me like

(Testimony of Emma Lundby)
trifling with the Court and taking up time. It is simply trifling with the Court. Get down to something that is material to the issues of this case and let's start trying it.

(Defendant's Exhibit 12, which was refused admission in evidence is as follows:)

Exhibit 12

"Minutes of Special Meeting of Board of Directors, Held on Thursday, January 4th, 1945.

All of the Directors of said corporation having heretofore filed waiver of notice of special meeting of the Board of Directors of said corporation and Emma Lundby, Luella Lundby and L. P. De Pratu all being present, the following transpired at said special meeting held in the City of Great Falls on Thursday, the 4th day of January, 1945, with L. P. De Pratu as President, presiding:

L. P. De Pratu reported to the directorate the progress he had made in the construction of said building and reported the amounts of money expended by him personally.

Upon motion duly made by Louella Lundby and duly seconded by Emma Lundby, thanks were extended to the said L. P. De Pratu for the work done by him to said date, and upon motion duly made, seconded and carried it was voted the said L. P. De Pratu should continue his work of construction on said building.

(Testimony of Emma Lundby.)

There being no further business before the meeting, upon motion duly made, seconded and carried said meeting was duly adjourned.

L. P. DE PRATU,
President.
EMMA LUNDBY,
Secretary." [151]

Q. (By Mr. Acher): Miss Lundby, briefly, where had you and your sister and Mr. De Pratu been in business over this 20 year period you told about?

The Court: That's entirely immaterial. We are not going to trace the history of this witness over 20 years. Get down to the charges made in this indictment.

Q. Are you familiar with the application which was made for a retail liquor license in January, 1946? A. Yes.

Q. Had the Stockman's Club been in operation or open for business prior to January or February, 1946? A. No.

Q. Showing you plaintiff's Exhibit No. 2, did you see that before it was presented to the State Liquor Control Board? A. No.

Q. Well, in the minutes which have been read in evidence, it refers to an application being made for a liquor license for the Stockman's Club. Are you familiar with those minutes we read to the jury?

A. Yes, sir.

Q. Were you aware of an application being made for a liquor license? A. Yes.

(Testimony of Emma Lundby.)

Q. Showing you plaintiff's Exhibit No. 2, you will note the Notarial seal is by B. O'Neil? [152]

A. Yes, sir.

Q. Do you know that person?

Mr. Pease: Objected to as having nothing to do with the document. As far as we know, the seal proves his capacity.

The Court: It may not. I can't say at this time it does. I will overrule the objection, it may lead up to something.

Q. (By Mr. Acher): Did you have occasion to see this application before it was sent into Helena, or did you know anything about it?

A. Yes, I knew it was being made.

Q. And do you know who it was sent to in Helena?

A. The State Liquor Control Board.

Q. Sent direct, or to Sherman Smith, or do you know that? A. No, I don't know.

Q. Does Mr. De Pratu do typing? A. No.

Q. Was this filled out—do you have an office at the Stockman's Club? A. Yes.

Q. With typewriters and so forth?

A. Yes.

Q. Do you know whether or not this was filled out there? A. I don't remember.

Q. You don't remember. Showing you plaintiff's Exhibit No. 1, which is a like application six months later, I will ask you [153] who the Notary there, Mr. Moerl, where he was located?

A. Great Falls, Montana.

(Testimony of Emma Lundby.)

Q. Was he employed at the Stockman's Club?

A. Yes, sir, he was.

Q. At that time in June, 1946?

A. Yes, sir.

Q. As the bookkeeper? A. Yes sir.

Q. Miss Lundby, have you had occasion through your association in business with Mr. De Pratu to observe his ability to hear, whether he is hard of hearing or not?

A. Yes, he is hard of hearing.

Q. What have you observed as to how that affects his conduct with people, as to whether he avoids letting people know he is hard of hearing, and if so, how he does it?

Mr. Angland: To which we object, your Honor——

The Court: Sustained.

Mr. Acher: You may cross-examine.

(Whereupon, an adjournment was taken until Friday, January 9, 1948, at 10:00 o'clock a.m., at which time the following proceedings were had:)

EMMA LUNDBY

a witness on behalf of the defendant, resumed the witness stand.

Mr. Acher: Could I have leave to ask one or two questions?

The Court: Very well.

Q. (By Mr. Acher): Miss Lundby, your sister, Louella, was born [154] in the United States?

A. Yes.

(Testimony of Emma Lundby.)

Q. And lived in the United States all her life?

A. Yes.

Q. You were born in the United States?

A. Yes.

Q. And lived in the United States all your life?

A. Yes.

Q. Mr. De Pratu, the defendant here, is of the white race? A. Yes.

Mr. Acher: That is all.

Mr. Pease: No cross-examination.

(Witness excused.)

Mr. Acher: The defendant rests.

Mr. Pease: The government rests.

Mr. Acher: At this time, if your Honor please, the defendant would like to make a motion for judgment of acquittal, which is in printed form, although if your Honor prefers, I can read it.

(Jury retires from Courtroom.)

(Title of Court and Cause.)

Motion for Judgment of Acquittal

Comes now the defendant and moves the Court to order the entry of a judgment of acquittal upon the following grounds:

1. Upon the first count of the Indictment upon the ground that the evidence is insufficient to sustain a conviction [155] of the defendant of such an offense.

2. Upon the second count of the Indictment upon the ground that the evidence is insufficient to sustain a conviction of the defendant of such an offense.
3. Upon the third count of the Indictment upon the ground that the evidence is insufficient to sustain a conviction of the defendant of such an offense.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for defendant.

Mr. Acher: May it please the Court, in order to clear the record, yesterday I dictated a motion, and I served and filed a paper which I would like to have the record show as withdrawn because it wasn't a motion for a directed verdict. I would like to withdraw it so there won't be any confusion.

The Court: I had that in mind yesterday.

Mr. Acher: I didn't intend to file it. I dictated it.

The Court: You dictated it. When I ruled on your motions, I denied specifically your oral motion, and by separate order I denied the other written motion, so I think that keeps the record in good enough shape, because the motion was a motion for judgment of acquittal, and that, in my opinion, can be made at the close of the government's case. It might be better to leave the record that way because in case of misfortune down here for the defendant, the Circuit Court might decide there is [156] some merit to the motion. The defendant's motion for judgment of acquittal made at the conclusion of

all of the evidence is denied. The Court will be at ease for a moment until I get the proposed instructions.

Mr. Acher: I had three or four new instructions this morning. The first one is rather confusing——

The Court: I haven't seen them.

Mr. Acher: I handed them to the Clerk. The first one is rather confusing because it is just the liquor statutes and I also added three or four pages to our brief.

The Court: You have seen these, Mr. Pease?

Mr. Pease: Well, Mr. Angland has examined the instructions that were tendered yesterday, and I haven't looked at those. This morning, your Honor, I looked at some of those this morning you are referring to now that have just been tendered. I see we have again the question of circumstantial evidence and the question whether this is a circumstantial case.

The Court: Well, I don't see any fact that is necessary to be established here that hasn't been proved by direct evidence.

Mr. Acher: If the Court please, I think that the intent, that it was done knowingly, would have to be inferred from other facts proven in evidence, and that for that reason it is a circumstantial evidence case.

The Court: In other words, your position is in all cases in which knowledge or intent is an element of the offense, that [157] makes it a circumstantial evidence case and requires the giving of an instruction on circumstantial evidence?

Mr. Acher: The whole essence of this crime is falsely knowingly doing something. It is different from a murder case or an assault case or something of that kind.

The Court: In what respect? There you must prove an evil mind, guilty intent. In a murder case, first degree murder, premeditation and an intent is essential. What is the difference between intent in a murder case and any other case in which intent becomes essential to the crime?

Mr. Acher: I am not prepared to say you wouldn't be entitled to an instruction on circumstantial evidence in such a case, because in every murder case I have been involved in, we have gotten an instruction on circumstantial evidence.

The Court: In any I have been involved in, no instruction on circumstantial evidence with reference to intent has ever been given. But, is it your position that intent can only be proven by circumstantial evidence, that there is no other way to do it?

Mr. Acher: No, I think if we had some statements or admission or confession. A confession is direct evidence, an admission is not ordinarily, it requires inferences.

The Court: Well, do you think that an inference drawn by a jury from direct evidence is circumstantial evidence? The statute says what evidence is.

Mr. Acher: I would like to refer, your Honor, to a case [158] or two. United States v. Greene, 146 Federal, certiorari denied at 207 U. S., said "Direct evidence is that which immediately points to the question at issue. It is positive in its character. It

often depends upon the credibility and the intelligence of the witnesses who testify to knowledge of the facts. It may also be documentary in character. Indirect or circumstantial evidence is that which tends to establish the issue only by proof of facts sustaining by their consistency the hypothesis claimed, and from which the jury may infer the fact. Direct and circumstantial evidence differ merely in their logical relations to the fact in issue. Evidence as to the existence of the fact is direct. Circumstantial evidence is composed of facts which raise a logical inference as to the existence of the fact in issue.

The Court: There is no quarrel with that decision, except as I view it, the situation isn't present here that would make that apply here. We have direct and positive evidence, oral and in writing, that the man said he was a citizen of the United States. We have direct and positive evidence, if believed by the jury, that the man is not a citizen of the United States. Neither one of those things have been proven by circumstantial evidence or indirect evidence.

Mr. Acher: I think, your Honor, he has not been proven to be not a citizen. I think Mr. Davidson talked on that. He hasn't been proven not a citizen by direct evidence [159]

Mr. Davidson: If the Court please, it appears to us that the only way the jury could possibly pass upon this question as to whether or not this man is a citizen of the United States is by inference. As pointed out by the Court yesterday, the record

shows this man was born in Canada, and the Court indulged in the presumption that a citizenship once having been shown to exist continues to exist until the contrary is shown.

The Court: That is the statute, isn't it, Mr. Davidson?

Mr. Davidson: Not quite, your Honor. A thing once proven to exist continues as long as is usual with things of that nature.

The Court: Isn't it usual with citizenship that it exists until a change has been made?

Mr. Davidson: Yes, that is true, your Honor. However, may I point out this to the Court, that Section 1993 of the Revised Statutes, which was in existence at the time this man entered the United States, provides: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be, at the time of their birth, citizens thereof, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose father never resided in the United States." It is our contention, if the Court please, that the presumption could not follow by reason of that statute because there is [160] nothing in evidence to show that the defendant's father was not a citizen of the United States at the time of defendant's birth. He might have been a citizen of the United States and temporarily residing in Canada. I might call a vivid example of that to the Court's attention with respect to one of the immigrant inspectors stationed in Winnipeg, whose children were born there. They

were born citizens of the United States. So, we feel that the presumption cannot go so far as to say because he was born outside of the United States, it must necessarily be presumed he was not a citizen of the United States, because, had his father been a citizen, either by birth or naturalization, at the time of defendant's birth, then the defendant was a citizen of the United States.

The Court: As to that part of it, I am not relying on the presumption at all. To me, and I so hold, the fact that this man was born out of the United States establishes, as a matter of fact, and not by any presumption at all, him as being a Canadian citizen, and that being established that he is a Canadian citizen, then I have reference to the presumption of the continuity of citizenship.

Mr. Davidson. That is the question we had in mind. We have doubts as to that presumption being used because of Section 1993.

Mr. Acher: We have another point, your Honor. We have some cases that the presumption of innocence would overcome the [161] other presumption.

The Court: The presumption of innocence overcomes the other presumption, not as a matter of law, but if the jury so holds. Do you have any case that the presumption of innocence overcomes any other legal presumption as a matter of law?

Mr. Acher: I think the case of State v. Sanford, a New Mexico case, where the Court quoted from the United States Supreme Court case of Carver v. United States, and said— this is quoted from the Supreme Court case—"The statements of Miller

made at the later interview, if not coming within the category of dying declarations, were hearsay, and should not have been permitted to go to the jury. It was incumbent upon the state to lay the foundation for their admission as dying declarations. Defendants could rely upon the presumption of innocence, and deceased then believed he might recover." The Court in this New Mexico decision then states, "The last sentence of the foregoing quotation suggests a consideration of the rule stated by Mr. Lawson in his work on the Law of Presumptive Evidence at Page 240, as follows: 'In the case of conflicting presumptions the presumption of the continuance of things is weaker than the presumption of innocence.' An examination of the authorities relating to the rule that the existence of a state of facts or condition once proven to exist continues, is ordinarily invoked in civil cases only. In our opinion, in accordance with the view expressed by Professor [162] Lawson, and also by Judge Blanchard in State v. Sadler, the so-called presumption should be sparingly applied in a case where the life or liberty of an accused is at stake."

Court: How can you sparingly apply it? It would be error for the Court to charge the jury on the continuity of things because the presumption of innocence is there entered. How do you justify the language that it should be sparingly applied? It doesn't appeal to me. A presumption is made evidence, and I intend to charge this jury that presumptions have the force and effect of evidence, not the presumption of innocence alone, but all

presumptions, the presumption of sanity, the presumption that a sane man intends the natural and ordinary consequences of his voluntary act. One isn't of any more efficacy than the other.

Mr. Acher: Of course, in Morrison v. California, which is by Cardozo, the Court considered the Alien Land Law of California. The legislature sought to establish by law that the burden was on the Japanese to show that they were citizens. The Supreme Court held it unconstitutional, as I recall it.

The Court: If they did, they held it unconstitutional if the Japanese claimed to be born in the United States, but they never held it unconstitutional if the Japanese said he was born in Japan, and particularly in deportation proceedings, the burden then is upon the alien to establish citizenship.

Mr. Acher: I think there is a distinction. Defendant, [163] according to the record, came in legally when he was under age, and we contend that in order to support a verdict of guilty, you have to rely on the presumption of continuity overcoming the presumption of innocence.

The Court: You don't rely on any presumption. You rely on a fact. He was born in Canada. That is no presumption, it is a fact.

Mr. Davidson: Under the statute he could have been born outside of the United States and still be a citizen.

The Court: He could have been, but lawsuits are not determined by what could happen, but what did

happen. Ninety-nine and ninety-nine hundredths per cent of the people born in a nation are citizens of that nation. It is only a rare exception when one is a consular officer, or an officer of the government, or something of that kind and stationed in a foreign nation in his official capacity that the rule applies.

Mr. Acher: Going back to this other point, your Honor, there is one case from the 9th Circuit by Judge Denman, C.I.T. Corporation v. United States, 150 F(2d) 85, "The crime charged against Thomas was conspiracy to cause to be made an instrument knowing the same to be false and for the purpose of influencing the action of the Administration. Knowledge of falsity and a purpose, that is, intent to use the falsehood for such influence, is the essence of the crime. It is not sufficient to prove Thomas guilty to show that he signed a document with an [164] untruthful statement which might tend to influence the Administration. The burden on the government is to prove his knowledge of its falsity and his criminal intent so to influence the Administrator's acceptance of the borrower's note. This proof may be by circumstantial evidence, but such facts must be proved."

The Court: May be, yes. As I view it, any fact issue in a criminal case may be proved by circumstantial evidence as well as direct evidence.

Let the record show at the conclusion of all of the evidence, that both parties having rested, the Court now rules upon the request of the defendant heretofore presented to the Court for specific charges by the Court to the jury, and the Court refuses to

give the defendant's requested instruction No. 1. The Court will cover it in substance, in the opinion of the Court, in the charge of the Court itself. Is there any objection or exception to the refusal of the Court to give defendant's proposed Instruction No. 1?

Mr. Acher: We would like to except, your Honor.

The Court: Very well, exception will be entered. The Court refuses to give defendant's requested instruction No. 2. It will be covered by the Court in its charge. Is there any objection or exception?

Mr. Acher: Note our exception.

The Court: Very well. The Court will give the Defendant's [165] Requested Instruction No. 3. Has the government any objection or exception?

Mr. Pease: None, your Honor.

The Court: The Court refuses to give the Defendant's Requested Instruction No. 4. It will be covered wherever proper by the Court's charge to the jury. Has the defendant any objection or exception?

Mr. Acher: Note our exception.

The Court: The Court refuses to give Defendant's Requested Instruction No. 5. It will be fully covered in the charge of the Court to the effect the burden is upon the government to prove the guilt of the defendant beyond a reasonable doubt before the jury may convict him, and if they have any doubt whatsoever, it is their duty to find the defendant not guilty. Does the defendant have any objection or exception to the refusal of the Court to give Instruction No. 5?

Mr. Acher: Note our exception.

The Court: The Court proposes to give Defendant's Requested Instruction No. 6. Has the government any objection or exception?

Mr. Pease: None, your Honor.

The Court: The Court proposes to give the Defendants' Instruction No. 7 after deleting therefrom the words, "or the absence of intent." The defendant is presumed to be sane.

Mr. Acher: No objection. [166]

The Court: It is established here he committed an act and a sane man can't commit an act without some kind of intent, whether it is innocent intent or guilty intent.

Mr. Acher: No objection.

The Court: The Court proposes to refuse Defendant's Instruction No. 8. Where proper, it will be covered by the instructions of the Court.

Mr. Acher: Note our exception.

The Court: The Court proposes to refuse to give Defendant's Instruction 9. Where proper it will be covered by the Court's charge.

Mr. Acher: Note our exception.

The Court: The Court proposes to refuse to give Defendant's Instruction 10.

Mr. Acher: Note our exception.

The Court: The Court will refuse to give Instruction No. 11.

Mr. Acher: Note our exception.

The Court: I think that is just a portion of the statute of the state with some of the language left out. As I recall, I think the state statute defines the

word "wilful" as implying a purpose or willingness to commit the act whether there is knowledge or something of that kind as to whether the act is criminal or not. I have forgotten the exact wording. This isn't a copy of the statute, is it?

Mr. Acher: It is an instruction we have used in some [167] other case, Your Honor; I don't have authorities cited here. No. 12 is taken from the various decisions I have cited.

The Court: Well, the Court will refuse to give proposed Instruction No. 12.

Mr. Acher: Note our exception.

The Court: The Court will refuse to give Proposed Instruction No. 13.

Mr. Acher: Note our exception.

The Court: The Court refuses to give Proposed Instruction No. 14.

Mr. Acher: Note our exception.

Mr. Acher: I think that one should be withdrawn, your Honor, I can't see any applicability——

The Court: Which one do you think you ought to withdraw? I certainly do not agree with the doctrine of law where it is said if a man makes a statement purporting to be a fact his statement is no evidence of the fact. If these decisions hold this, I don't intend to follow those decisions. When a may says outside of court that he is a citizen, the jury might consider he is telling the truth about that even though he says in court and under oath he is not a citizen. I am going to refuse to give it.

Mr. Acher: I think the Warzower case throws some light on that where the Court said in the War-

zower case—it is a late United States Supreme Court case in point on this, it is [168] in my brief—"Where the crime charged is a false statement and where it finds its only proof in admissions to the contrary prior to the act set out in the indictment, it may be unlikely that a jury will conclude that the falsity of the later statement is proven beyond a reasonable doubt but such evidence justifies submission of the question to them."

The Court: I think so. Well, the Court refuses to give Defendant's Requested Instruction No. 15.

Mr. Acher: Note our exception.

The Court: Well, what do you think about Instruction 16, Mr. Pease?

Mr. Pease: I think, your Honor, it is absolutely inapplicable to the record in this case, because whether or not the government proved the motive on the part of the defendant, certainly the defense evidence itself proved the motive.

Mr. Acher: Our theory on that Instruction, your Honor, is that we have a club with three members; two of them have been shown qualified to get a license, in fact, it was assigned to one of them, which would show that the Liquor Board would have approved that particular one, and there would be no reason that this man should commit a felony to get the license. Under this Montana decision, I think——(Interrupted)

The Court: Any man charged with a crime—there is absolutely no reason, as far as that is concerned, for any man to commit a crime. Anyone else could have got the license, but they didn't. [169]

Mr. Acher: If a man robs a bank, we would assume he did want to get money.

The Court: Yes, and if a man is getting a license for a saloon that can't itself get the license, you assume he wants money too. It is all done for profit. The only thing I am in doubt about is whether or not a charge on motive is a proper charge in a criminal case. It is not necessary for the government to prove motive in order to sustain a conviction. Whether a motive is or is not established is entirely immaterial.

Mr. Pease: It seems to me also, your Honor— (interrupted)

The Court: I think I will refuse it. There may be some motive, but motive is not an element in a criminal case at all.

Mr. Pease: I would like to make a specific objection to the Instruction, your Honor. There is no definition of motive accompanying the instruction so that it would very likely be confusing to the jury so that they would confuse it with the element of intent.

The Court: Then there might have been some motive entirely unknown to the jury. Well, that is Instruction 16 that I refuse to give.

Mr. Acher: We note an exception.

The Court: I doubt the applicability of No. 17, but I am going to give it.

I am going to give Defendant's Requested Instruction No. 18. [170]

The Court: I am going to refuse to give Defendant's Requested Instruction No. 20. It will be

fully covered by the instructions of the Court, and I don't think it is proper in giving a charge to the jury to reiterate, to emphasize any particular portion of the charge.

Mr. Acher: Which one are you ruling on?

The Court: No. 20.

Mr. Acher: What happened to No. 19, your Honor? It is conjectures and surmises.

The Court: Well, we will get to that. I don't know where that is. Well, Defendant's Instruction No. 19 is refused. The Court intends to charge the jury as set out in that instruction, but close after the word "true," but I deny the instruction as given or offered.

Mr. Acher: Your Honor, I wonder if we could discuss the first portion of it in the argument up to the point you have indicated?

The Court: Yes, any instruction I have indicated I am going to give you can discuss in the argument.

The Court refuses to give Defendant's Proposed Instruction 21.

Mr. Acher: Note our exception. And did the record show that No. 20 is refused? I interrupted there, and I am not sure.

The Court: I did refuse to give No. 20 [171]

Mr. Acher: Note our exception to the refusal to give No. 20.

The Court: The Court refuses to give Instruction No. 23.

Mr. Acher: Note our exception.

The Court: The Court refuses to give Instruction No. 24.

Mr. Acher: Note our exception.

Mr. Angland: No 22 was missed.

The Court: Well, I will give Instruction 22. That seems to be the statute of the state. I think the District Attorney should do a little research and copy some of the statutes of the state that are applicable and tender them to me, that an alien is not qualified to possess a liquor license; another one that clubs such as this are not themselves qualified to hold a liquor license unless it has been incorporated for a year or two years, whatever the time might be.

Mr. Angland: That is in this one, your Honor. I see that in the middle of the page here, your Honor, starting about line 19, the definition of club.

The Court: Oh, yes.

Mr. Angland: The one here applies to the beer license and not to the liquor license and would serve only to confuse the jury.

The Court: Well, the Court will refuse to give Instruction 25. There is absolutely no basis in the evidence to justify a giving of any such instruction.

Mr. Davidson: Note an exception.

The Court: The Court will refuse to give Instruction No. 26. There is no basis in the evidence that would support the giving of the instruction, in the opinion of the Court.

Mr. Davidson: Note an exception.

The Court: The Court has marked on the instructions refused the word "refused," and on the instructions it proposes to give the word "given."

Instructions offered by the defendant and given by the Court are as follows:

Defendant's Requested Instruction No. 3

You are instructed that the defendant in this case is not required to prove anything. The burden rests upon the plaintiff, United States of America, to prove to your satisfaction, beyond a reasonable doubt, each and every element necessary to constitute the crimes charged in each count of the indictment herein, and if after considering all of the evidence in the case, together with the presumption of inocence, you have a reasonable doubt as to the existence of one or more of these elements, your verdict must be not guilty. At no time does it dissolve upon the defendant to prove his innocence or even to raise a reasonable doubt in your minds as to his guilt, but the burden is at all times upon the United States of America to prove beyond a reasonable doubt that the defendant is guilty as [173] charged in the indictment, and if that has not been done, your verdict must be not guilty.

Given.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 6

The jury are instructed, that in every crime or public offense, there must be a union or joint operation of act and intent, and both of these elements, viz., act and intent, must not only exist, but must be proven in this case to the satisfaction of your minds, beyond a reasonable doubt, else you must find the defendant not guilty.

Given.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 7

The intent with which an act is done may be inferred from the attendant circumstances; but, when the circumstances are such as to furnish the basis for an inference of some intent other than that necessary to constitute the particular crime charged (or the absence of any intent), a verdict of guilty of the crime charged cannot be sustained.

Given.

R. LEWIS BROWN,
Judge.

(The phrase enclosed in parenthesis was deleted by the Court.) [174]

Defendant's Requested Instruction No. 17

You are instructed that evidence of oral admissions of a party is to be viewed with caution.

Given.

BROWN,
Judge.

Defendant's Requested Instruction No. 18

No juror should surrender his deliberate, conscientious convictions merely at the behest of a majority of the jurors or for the sake of unanimity, but as long as any juror has a reasonable doubt as to the guilt of the defendant, such juror should continue to vote not guilty.

Given.

BROWN,
Judge.

Defendant's Requested Instruction No. 22

You are instructed that the laws of the State of Montana provide as follows:

Section 2815.34 provides:

"Any club desiring to possess or have for sale beer under the provisions of this act shall make application to the Board for a permit so to do, accompanied by the license fee herein prescribed. Upon being satisfied from such application, or otherwise, that such applicant is qualified as herein provided, the Board shall issue such license to such club, which license shall be at all times prominently displayed in the club premises. [175] If the Board shall find that such applicant is not qualified, no license shall be granted and such license fee shall be returned. The Board shall have the right at any time to make an examination of the premises of such club and to check the alcoholic content of beer being kept or sold in such club."

Section 2815.37 provides:

"No club shall be granted a license to sell beer:

(a) If it is a proprietary club or operated for pecuniary gain.

(b) Unless such club was established as such club for at least one (1) year immediately prior to the date of its application for a license to sell beer."

Section 2, Chapter 84, Laws 1937, provides in part:

"'Club' means a national fraternal organization, except college fraternities, or an association of individuals organized for social purposes and not for profit, with a permanent membership and an existence of two years prior to making application for license with permanent quarters or rooms."

"'Person' means every individual, co-partnership, corporation, hotel, restaurant, club and fraternal organization, and all licensed retailers of liquor, whether conducting the business singularly or collectively."

Section 3, Chapter 84, Laws 1937, provides:

"The Montana liquor control board is hereby empowered, authorized and directed to issue licenses to qualified applicants [176] as herein provided, whereby the licensee shall be authorized and permitted to sell liquor at retail, and upon the issuance of such license the licensee therein named shall be authorized to sell liquor at retail but only in accordance with the rules and regulations promulgated by the said board and the provisions of this act. Qualified applicants shall include persons, hotels, clubs, fraternal organizations and railway systems."

Section 9, Chapter 84, Laws 1937, provides:

"No person shall be granted more than one license in any year. No person, club, or fraternal organization shall be entitled to a license

under this act unless such person, club, or fraternal oganization shall have a beer license issued under the laws of Montana."

Given.

BROWN,
Judge.

Instructions offered by the defendant and refused by the Court are as follows:

Defendant's Requested Instruction No. 1

To this indictment the defendant had pleaded not guilty, and under that plea he denies every material allegation of the indictment against him. No presumption is raised by the law against him, but every presumption of law is in favor of his innocence, and in order to convict him of the crime charged against him every material fact necessary to constitute such crime must be proven by the government by competent evidence, beyond a reasonable doubt; and if the jury entertain any reasonable doubt upon any fact or element necessary to constitute the crime charged, it is your duty to give the defendant the benefit of such doubt and acquit him.

Refused.

R. L. B.,
Judge.

Defendant's Requested Instruction No. 2

You are instructed that the Defendant comes into Court protected by the presumption of law that he is innocent of any crime, and particularly the crime charged against him in the indictment. The defend-

ant is presumed to be innocent until his guilt is established beyond a reasonable doubt. This presumption attends him at every step and throughout the entire case, and to its benefits he is entitled in deciding every question of fact. That he has been suspected and charged with the perpetration of a crime does not in any degree tend to show his guilt or remove from him this presumption of innocence which the law throws about him. The indictment in this case is only a formal written accusation of crime required as an essential preliminary to a trial, but in itself is not any evidence of crime. It is merely a formal charge for the purpose of putting the defendant upon trial and should not influence you in arriving [178] at your verdict, nor should it be allowed to in any way prejudice you against the defendant, but you should determine his guilt or innocence by a careful consideration of all the evidence introduced in the case during the trial.

Refused.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 4

A reasonable doubt is not such a doubt as a man may start by questioning for the sake of a doubt, nor a doubt suggested or surmised without foundation in the facts or testimony. It is such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of the highest and gravest importance, prevents the jury from coming to a conclusion in which their minds rest satisfied.

If so using the mind and considering all of the evidence produced, it leads to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact it is the duty of the jury to declare the fact by their verdict.

It is possible always to question any conclusion derived from the testimony, but such questioning is not what is termed a reasonable doubt. A reasonable doubt exists only in that state of the case which after the entire comparison and consideration [179] of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Refused.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 5

Where, in the consideration of the evidence in a criminal case, the jury concludes that upon such evidence it cannot say whether the defendant is guilty or not guilty, then it is the duty of the jury to return a verdict of not guilty.

Refused.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 8

You are instructed that under the first and second counts of the indictment the defendant is charged with having knowingly, falsely, and feloniously rep-

resented himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without otherwise being a citizen of the United States.

Under this charge the Government must prove beyond a reasonable doubt:

First: That the defendant in an application for a retail liquor license at the time and place referred to in the Indictment [180] did state that he was a citizen of the United States.

Second: That the defendant was not a citizen and that therefore the statement was untrue.

Third: That the defendant did not believe he was a citizen when he so stated, if he did so state, and that said statement was made knowingly, falsely and feloniously as those words are elsewhere defined in these instructions.

All three of the foregoing elements must be proved beyond a reasonable doubt, and if you have a reasonable doubt as to any one of the foregoing matters you must acquit the defendant.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 9

You are instructed that under the third count of the indictment the defendant is charged with having wilfully and knowingly, under oath testified falsely that he was a citizen of the United States whereas the defendant was not a citizen as he well knew.

Under this charge the government must prove beyond a reasonable doubt.

First: That the defendant testified that he was a citizen.

Second: That the defendant was not a citizen and that therefore the statement was untrue.

Third: That the defendant did not believe that he was a [181] citizen when he so testified, if he did so testify, and that the testimony was given knowingly, falsely, wilfully and feloniously as those words are elsewhere defined in these instructions.

All three of the foregoing elements must be proven beyond a reasonable doubt, and if you have a reasonable doubt as to any one of the foregoing elements of the crime charged you must acquit the defendant.

Refused.

R. LEWIS BROWN,
Judge.

Defendant's Requested Instruction No. 10

The word "feloniously" is descriptive of the act charged. To establish that an act was done feloniously it must be shown that the act was done with a mind bent on doing that which is wrong, or, as it has been sometimes said, with a guilty mind.

Refused.

BROWN,
Judge.

State v. Connors,
37 Mont. 15, 94 P. 199;
State v. Rechnitz,
20 Mont. 488, 491, 52 Pac. 264.

Defendant's Requested Instruction No. 11

You are instructed that the word "wilful," when applied to the intent with which an act is done or omitted, implies a purpose or willingness to commit the act. It means intentionally; [182] that is, not accidentally.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 12

The word knowingly as used in this indictment means with guilty knowledge, that is deliberately and with knowledge and not something which is merely careless, or negligent or inadvertent.

Refused.

BROWN,
Judge.

Cliquot v. United States,
3 Wall 114, 18 L. Ed. 116;
U. S. v. Ill. Cen.,
303 U. S. 239, 82 L. Ed. 777;
Brouder v. U. S.,
312 U. S. 335, 85 L. Ed. 862.

Defendant's Requested Instruction No. 13

The word "falsely" as used in this indictment means something more than an untruth and includes perfidiously or treacherously or with intent to defraud.

Refused.

R. LEWIS BROWN,
Judge.

U. S. v. Achtner (CCA2) 144 F (2nd) 49.

Defendant's Requested Instruction No. 14

The Court charges you that before you can convict on circumstantial [183] evidence the circumstantial evidence must be consistent with the guilt of the defendant upon trial and inconsistent with his innocence, and the evidence must be so strong, clear and conclusive as to the guilt of the defendant as to remove every other reasonable hypothesis except the defendant's guilt.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 15

You are instructed that when a witness has been contradicted by showing that he made inconsistent statements at another time, the previous contradictory statements are not evidence of the facts related in such statements. The fact that the witness has made contradictory statements may be considered by you in considering the credibility of the witness, but the subject matter of the previous contradictory statements inconsistent with his testimony on the trial cannot be considered as evidence of the facts stated in such previous statements.

Refused.

BROWN,
Judge.

Stevens v. Woodmen of World, 105 M. 121;
State v. Trayer, 109 M. 277;
Wise v. Slagg, 94 M. 321. [184]

Defendant's Requested Instruction No. 16

You are instructed that if the evidence fails to show any motive on the part of the accused to commit the crime charged in the indictment, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict.

Refused.

BROWN,
Judge.

State v. LaSing, 34 M, 31, 39.

Defendant's Requested Instruction No. 19

You cannot find the defendant guilty in this case upon conjectures, however shrewd, nor upon suspicions, however well grounded, nor upon probabilities, however strong and convincing they may be, but only upon evidence which establishes his guilt beyond a reasonable doubt, that is upon proof such as logically compels the conviction that the charge is true and if the evidence presented to you by the government in this case goes only so far as to create in your minds conjectures, suspicions or probabilities as to the guilt of the defendant, then your verdict should be not guilty.

Refused.

BROWN,
Judge.

State v. Konan, 84 Mont. 255. [185]

Defendant's Requested Instruction No. 20

The Burden is not upon the defendant to prove that he is a citizen of the United States; upon the contrary the burden is upon the government to prove that the defendant is not a citizen of the United States.

If you find from the evidence that the government has failed to prove that the defendant is not a citizen, or you have a reasonable doubt as to whether or not the government has proved the defendant to be an alien, then you must acquit the defendant.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 21

You are instructed that under the third count of the indictment each essential element of the case must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances, and it is not sufficient where the testimony of two witnesses are relied upon that each of the witnesses testified to different elements of the crime charged, but the law requires in such case that two witnesses testify to each of the essential elements of the crime charged or that one witness has testified directly to such element and that the testimony of such witness is corroborated by the circumstances.

It is therefore necessary for you to understand what is [186] meant by the word "corroborate" and

"corroboration." To corroborate means to strengthen; to make more certain; to add weight or credibility to a thing; to confirm by additional security; to add strength. Evidence which does any of these things is evidence which corroborates, and is corroborating evidence. It does not mean facts which, independent of the evidence being corroborated, will warrant a conviction, but it is evidence which tends to prove the defendant's guilt independent of the evidence which is corroborated.

Refused.

BROWN,
Judge.

People v. Follette, 240 Pac. 518;
People v. Woodcock, 199 Pac. 565.

Defendant's Requested Instruction No. 23

You are instructed that the basic distinction between direct and circumstantial evidence is that in the former instance the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case proof is given of facts and circumstances from which the jury may infer other connected facts which reasonably follow, according to the common experience of mankind.

Refused.

BROWN,
Judge.

20 Am. Jur. Sec. 270. [187]

Defendant's Requested Instruction No. 24

You are instructed that in this case the essential elements of knowledge and intent must be established, if at all, by circumstantial evidence.

Refused.

BROWN,
Judge.

Defendant's Requested Instruction No. 25

You are instructed that all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Refused.

BROWN,
Judge.

Section 1993, Revised Statutes.

Defendant's Requested Instruction No. 26

You are instructed that the naturalization and admission to United States citizenship of a father automatically gave United States citizenship to his children under the age of 21 years lawfully admitted to and residing in the United States prior to the age of 21 years. You are further instructed that a person entering the United States prior to

June 29, 1906, is [188] presumed to have been legally admitted to the United States for permanent residence.

Refused.

BROWN,
Judge.

Sec. 2172 Revised Statutes;
Act of June 29, 1906,
C3592 Sec. 1, 34 Stat. 596.

The Court: Call in the jury. Open the argument for the government.

(Jury returns to courtroom.)

Mr. Pease made the opening argument on behalf of the government.

Mr. Acher made the opening argument on behalf of the defendant, during which argument the following transpired:

Mr. Acher: * * * was considered by Mr. Smith as an application on behalf of the Stockman's Club. (Interrupted)

The Court: Confine yourself to the evidence. No such evidence was permitted in the case. Objections were constantly sustained to that line of testimony. Confine yourself to the evidence.

Thereafter, Mr. Acher concluded his opening argument on behalf of the defendant.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m., the same day, January 9, 1948, at which time the following proceedings were had:)

Mr. Acher: If the Court please, in connection with my [189] argument and interruption by the Court, I have had a transcript prepared and submitted to your Honor. I would like to note an exception to the Court's remarks in view of the record.

The Court: Well, yes, you may have an exception to the Court's remarks, but the Court's remarks will stand. The answer of the witness was that he "told Sherman Smith and also Mr. Buley the Stockman's Club could not hold a liquor license because it had not been organized prior to two years before making application. That is the answer of the witness. It forms no basis for your argument that it was considered by Mr. Smith as an application on behalf of the Stockman's Club. Mr. Smith never said that, it wasn't contained in his answer, so your argument was not based on the evidence. You may have an exception to the remarks made to your argument, and to the remarks I make now in the presence of the jury. Conclude the argument for the defense.

Mr. Davidson made the closing argument on behalf of the defendant.

Mr. Angland made the closing argument on behalf of the government.

The Court: Well, ladies and gentlemen of the jury, the case is at the stage now where it comes to you and I for decision. I say you and I advisedly because it takes both of us to decide this case. Your oath as jurors that you have taken is that you will well and truly try the case and a

true verdict render in [190] accordance with the facts and the law as given to you by the Court; so you see each one of us plays a part in the decision of this case and the ultimate result as to the innocence or guilt of the defendant. You find the verdict. You must know before you can intelligently find the verdict what the facts in the case are, and that depends, of course, upon the testimony that you hear here, upon witnesses, their character and whether you believe them or not, and you are the sole and exclusive judges of the credibility of the witnesses and the weight to be given to their testimony, as to who of them you intend to believe, and you are the sole and exclusive judges of what the facts are in this case. I have nothing to do with that; your judgment as to the facts, as to the witnesses, binds me and controls, and I do nothing about it.

However, you could not return an intelligent verdict by knowing only what the facts are. You must also know what the law is, and I must decide that; I must decide that in advance of your retiring to the jury room, because you must know what the law is before you return your verdict, before you decide, and I must give it to you.

Now, as to that, I am the sole and exclusive judge of what the law is. That is my function here. I have the right to charge you as to what the law is, and I intend to do that, and under your oath, you must accept the law as I give it to you as the law in this case, and you can have no different idea [191] at all except as I give it to you; and

then apply the law as I give it to you to the best of your ability to the facts as you find them to be in the jury room and then return your verdict.

The defendant stands charged here by an indictment returned by the Grand Jury of three separate and distinct offenses against the laws of the United States. They are set out in writing in count one, two and three, and each of them, each one of them, if you believe them to be established by the evidence beyond a reasonable doubt, constitutes a separate offense against the laws of the United States. At the outset, I want to warn you and charge you that this indictment is not evidence in any sense of the word at all, and you are not to consider it as evidence. It does not prove or tend to prove in any degree the truth of any statement contained in this indictment, and you are not to consider it as doing that. You have no right to say to yourselves the statements must probably be true set out in there because the charge is made. You have no right to do that. It is not evidence. The indictment serves a specific purpose in the case. The law requires it to be filed and to be filed in writing so that you and I and the defendant may know just exactly with what he is charged, the specific particular charge made against him so that should he plead not guilty and demand a trial, we then can view the evidence in the light of the charge made to see whether or not the exact charge that is made has been proven, because if it isn't, why then, of course, [192] your verdict should be not guilty. The government must prove in exactitude the charge that is made against the defendant.

Count 1 of this indictment reads as follows: "On or about June 27, 1946, at Helena, in the District of Montana, and within the jurisdiction of this Court, the above named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, and without otherwise being a citizen of the United States, in that the said defendant, in an application for a retail liquor license under the laws of the State of Montana filed by him with the Montana Liquor Control Board, did state as follows: 'Are you a citizen of the United States? Answer, Yes,' whereas in truth and in fact said defendant was not then and never had been a citizen of the United States, which he, the said defendant, well knew." That is all of the first count.

The second count is in exact, identical language, except that it is said that the statement there as to his citizenship was contained in an application made on January 15, 1946, at Helena, six months before the application made in the first count, and that is the only difference.

Count 3 reads as follows: "That on or about September 11, 1946, at Sweetgrass, in the District of Montana, and within the jurisdiction of this Court, the above named defendant, Louis Raphael De Pratu, did knowingly, falsely and feloniously represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship and without otherwise being a citizen of the United States in that the said defendant,

before a board of special inquiry of the Immigration and Naturalization service of the United States, having been first duly sworn as a witness, did wilfully and knowingly testify as follows, 'Question, Of what country are you now a citizen? Answer, United States. I acquired United States citizenship through my father who naturalized in the United States while I was a minor,' whereas in truth and in fact the defendant was not then and never had been a citizen of the United States, as he, the said defendant then well knew." That is the third count.

Now, of course, ladies and gentlemen, it is necessary to know whether or not, if all of those facts set out in each of those counts have been established beyond a reasonable doubt, a violation of the law has been committed, and to ascertain that, it is necessary to turn to the Acts of Congress of the United States, and we find reported as an Act of Congress in Title 8, Section 746 of the penal provisions the following: "It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, whether an employee of the government of the United States or not, (a) 18, to knowingly to falsely represent himself to be a citizen of the United States, without having been naturalized or admitted to citizenship or without otherwise [194] being a citizen of the United States." So, you see, Congress has enacted that it shall be a felony for one knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship or without

otherwise being a citizen of the United States, and that is the essence of the charge that is made in each one of these three counts. So the question then is to be determined by the evidence in the case. You now know what the law is in that regard.

Now, however, the defendant appeared in court for his arraignment last June and pled not guilty to each of the offenses set out in this indictment, and by pleading not guilty, he then immediately cast upon the government the burden of establishing to your satisfaction beyond a reasonable doubt the truth of each and every material allegation that is set out in each one of those counts before a verdict of guilty would be justified. Now, the burden isn't on the government just to establish the truth of a portion of the material allegations, but the burden is upon the government to establish the truth of each and all and every of the material allegations set out in the three counts, and if the government fails to establish any one of them, the government then, of course, has not made a case, so in analyzing the indictment and as to the material allegations that the government must establish, we turn to count one, and the government must prove beyond a reasonable doubt [195] that on June 27, 1946, in an application made to the Montana State Liquor Control Board, the defendant there recited that he was a citizen of the United States; but the government must go further than that and must prove that, although he recited that, at the time he made that representation, if you find he did in that application, that he had not been naturalized as a citizen

of the United States or admitted to citizenship and was not otherwise a citizen of the United States; so the government must prove first, that he made the statement he was a citizen, that at the time he made it, he was not a citizen, either by naturalization or admitted to citizenship in any manner known to the law of this nation; but the government must go further than that and must prove that at the time he made the statement, if he made it, that he made it knowingly, he made it falsely and he made it feloniously. The government must prove all that. If it fails to prove any one of them, then your verdict must be not guilty in the case. If it proves all of them beyond a reasonable doubt to your satisfaction, then your verdict must be guilty, and that is true as to the second count. That is equally true as to the third count, because the gist of this case, the essential elements that must be established in all three counts is that he made the representation that he was a citizen; that at the time he was not a citizen, had not been naturalized and was not a citizen and that at the time he made it, he made it knowingly, falsely and feloniously. [196]

Now, ladies and gentlemen, that question, or those elements, rather the truth or the establishment of the truth of those elements depends largely upon the testimony you have heard in the case. You have received evidence from the witnesses that you must consider, and from all of them. You have also received evidence in the form of writings that are before you. There are other things, however, that

are evidence, have the force and effect of evidence, that are in the case that do not appear in writing and that no witness has testified to on the witness stand, and those are what are known as presumptions of law; and, of course, the chief presumption of law always in a criminal case, that is, in this case, and it has the force and effect of evidence, is what is known as the presumption of innocence, and that is, the defendant comes into court presumed innocent and that presumption protects him until such time when the jury shall believe from the evidence beyond a reasonable doubt that the defendant is guilty as charged in the indictment. the guilt of an accused is not to be inferred because the facts proved are consistent with his guilt, but on the contrary before there can be a verdict of guilty, you must believe beyond a reasonable doubt that the facts proved are inconsistent with his innocence, and if two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the former. So your frame of mind when you start this case, start to try this case as jurors, was and must be under [197] the law that the defendant is innocent of this particular offense, and it was in order to dispel that presumption of innocence and to overcome it that the government introduced evidence in this case, and of course, when you retire to your jury room you must weigh the evidence in the case in the light of the presumption of innocence, you must keep that presumption in your mind as you view the evidence in the case, and view it with the thought that

if the defendant did that, can he be innocent, is it consistent with his innocence. If you find it is, the presumption should control. However, after you view the evidence in the case and consider it, and keeping in mind the presumption of innocence, you may finally come to the conclusion from the evidence that although all of us are presumed to be innocent and that the defendant is presumed to be innocent by the law and the law presumes him innocent in this particular case, still after I have heard all this evidence and I have considered the evidence and I cannot say and I do not believe from the evidence that I have heard and it impresses me that the defendant is not innocent, then, if you come to that frame of mind, the presumption of innocence passes out of the case because it has been overcome by evidence, and evidence may overcome it, but it takes evidence to overcome it. If you believe from the evidence that you can not consistently attribute innocence to the defendant after listening to the evidence, then the presumption passes out of the case and it is your duty to [198] return a verdict of guilty in the case. Of course, it necessarily follows that you cannot find the defendant guilty in this case upon conjectures, however shrewd, nor upon suspicions, however well grounded; nor upon probabilities, however strong and convincing they may be, but only upon evidence which establishes his guilt beyond a reasonable doubt, that is, upon proof such as logically compels the conviction the charge is true, and the reason for that is, ladies and gentlemen, that you

act on evidence; mere suspicious, probabilities and conjectures are not evidence; they do not rise to the dignity of evidence, and the burden of proof is upon the government in the case.

The government makes the charge, the government is the accuser, and, of course, it is only fair that they, having made the charge, must be in a position to establish the truth of the charge before twelve impartial, fair minded persons; and it necessarily follows from what I tell you that the defendant is not required to prove anything at all in the case. The burden rests upon the plaintiff, the United States of America, to prove to your satisfaction beyond a reasonable doubt each and every element necessary to constitute the crime charged in each count of the indictment herein, and, if, after considering all of the evidence in the case, together with the presumption of innocence, you have a reasonable doubt as to the existence of one or more of these elements, your verdict must be not guilty. [199] At no time does it devolve upon the defendant to prove him innocence or even to raise a reasonable doubt in your minds as to his guilt, but the burden is at all times upon the United State of America to prove beyond a reasonable doubt that the defendant is guilty as charged in the indictment and if that has not been done, your verdict must be not guilty. Not only is the burden upon the government, but the burden is beyond a reasonable doubt. You must be satisfied in your minds to that extent before you can return a verdict of guilty of the charge.

Now, a reasonable doubt is what the term implies. It is a doubt founded upon reason. It does not mean every conceivable kind of a doubt. It does not mean a doubt that may be purely imaginary or fanciful or one that is merely captious or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason, and if, after considering the evidence in the case, you have such a doubt in your mind as would cause you to pause or hesitate before acting in a grave transaction of your own life, you have such a doubt as the law contemplates as a reasonable doubt. If, however, after considering the evidence in the case you have no such doubt in your mind as would cause you to pause or hesitate before acting in a grave transaction of your own lives, but would act unhesitatingly and without pause in such transaction, then you do not have such a doubt as the law contemplates as a reasonable doubt and the government has sustained its burden of proof. [200]

Now, there are contained in the indictment certain words that have been dwelt on in the argument, and I charge you that the word "knowingly"—it is charged he did these things knowingly—the word "knowingly" imports only knowledge that the facts existed which bring the act or omission within the provisions of the law. It does not require any knowledge of the unlawfulness of such act or omission.

The word "wilfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make

the omission referred to. It does not require any intent to violate law or injure another, or to acquire any advantage.

The word "falsely"—it is charged that the representation was made falsely—that always imports a fraud, and the word "falsely" as used in the indictment as describing the representation as to citizenship alleged to have been made by the defendant, means a representation made that is not true and that the party making it knows it is not true at the time it is made, and the party who makes it makes it at the time for the purpose of having the one to whom it is made believe it and accept it as true and act upon it as true, to the advantage and benefit of the one making it. When I say advantage to the one making it, it doesn't mean financial or monetary benefit, it means every kind of benefit which the one making it thinks will accrue to him by reason of making the statement. [201]

The word "feloniously," as used in the indictment, means that if the things were done that it is charged in the indictment that the defendant did, then the defendant was guilty of an offense against the laws of the United States constituting a felony as distinguished from a misdemeanor. A felony under the laws of the United States, is an offense committed against the United States, the punishment for which may be imprisonment in the penitentiary for a period exceeding one year, but need not necessarily be.

And I charge you that in every crime or public offense, there must be a union or joint operation of act and intent. In other words, it is not sufficient in this case to prove the act was done, the representation made, but you must also be satisfied as to the intent that existed in the mind of the defendant at the time he made it, and both of these elements, namely, act and intent, must not only exist, but must be proven in this case to the satisfaction of your minds beyond a reasonable doubt, else you must find the defendant not guilty, and the intent with which an act is done may be inferred from the attendant circumstances, but, when the circumstances are such as to furnish the basis for an inference of some intent other than that necessary to constitute the particular crime charged, a verdict of guilty of the crime charged cannot be sustained.

I charge you that the evidence of the oral admissions of the defendant is to be viewed with caution.

Of course, I have told you, ladies and gentlemen, that you have to do with the evidence, the credibility of witnesses. It is your burden to determine what the facts of the case are. However, your power of judging of the effects of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the laws of evidence, even though you are the sole and exclusive judges of the testimony and the weight and effect of the testimony. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence that satisfies your mind.

A witness false in one part of his testimony is to be distrusted in others.

Evidence is estimated not only by its own intrinsic weight, but also according to the evidence which is in the power of one side to produce and of the other to contradict, and, therefore, if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence is within the power of the party to produce, the evidence offered should be viewed with distrust.

The direct evidence of one witness entitled to full credit is sufficient for proof of any fact embodied in this case. Now, note ladies and gentlemen that I do not say that the direct testimony of one witness is sufficient for proof of any [203] fact. I do say that the direct evidence of one witness who is entitled to full credit. That is a witness who you believe absolutely is telling the truth, and if there is any such witness as that that has appeared before you on the witness stand, you have the right to accept his testimony, if you give it that credence, and decide the fact in accordance with his testimony, and it makes no difference how many witnesses may have testified to the contrary. In other words, the facts in issue in a lawsuit are determined not only by the quantity and number of witnesses that appeared on one side, but by the quality, and, of course, it is for you to say where the quality lies.

A witness is presumed to speak the truth, and that means this: You observed that each witness is sworn before he is permitted to go on the witness stand and testify, and when he took the oath that

he did to truly testify, the law presumes and I presume, and you must presume that he intends to obey his oath and tell the whole truth in this case. That is a presumption of law. It is what we know as a rebuttable presumption, because this presumption may be repelled by the manner in which he testifies, so that is the reason that witnesses are brought before you so you can observe them on the witness stand and see their attitude and conduct and demeanor while giving their testimony, while being questioned and interrogated, and judge not only from what they say, but how they say it, whether they are or are not trying to tell the truth, the whole truth [204] and nothing but the truth. So that is the reason why it is required of you when you are serving here to use two of your faculties, that is, the faculty of hearing to hear what the witness says, and your faculty of eyesight to determine how he says it and the manner in which he says it, because each is important to you in making up your mind whether or not you intend to believe that witness.

Now, the presumption that he is telling the truth may be repelled by the character of his testimony, that is, does it seem to you from your common experience you have had as men and women in daily contact with others over many years that those things ordinarily do happen, or does it appear to you from your experience that such things that the witness purports to say happened probably never happened. That is what is meant by the character of his testimony.

Now a witness is presumed to speak the truth and that presumption may be repelled by his motives. So, you have a perfect right when a witness is on the witness stand to view him with the thought in mind, does he have a motive, some reason, for giving the testimony he has given? Is there any reason that he might be influenced in his testimony or not tell the entire truth because of malice or ill will against the defendant, or, on the other hand, might he be influenced in giving his testimony, in not telling the whole truth, by some affection that he may have for the defendant; and if you feel there is a motive that any witness has for giving the character of testimony that he did give, and it might influence him not to truthfully testify, of course, you take that into consideration in weighing the testimony the witness gives, in judging his credibility and determining how much, if any, of it you are going to believe.

Or the presumption that the witness is presumed to speak the truth may be repelled by contradictory evidence, that is, if one witness gets on the witness stand and tells you that certain situations or facts exist, and another witness tells you that a certain situation or facts exist that are diametrically contradictory, that is contradictory evidence. Both can't be true, and you don't indulge the presumption that both of them are speaking the truth, you must decide which of the two you intend to believe.

Now, not only do you accept the witnesses' testimony and spoken word and you consider that, but you are also compelled to consider as evidence in

the case the inferences that you believe are naturally and logically to be drawn from his spoken words, what his spoken word means, that is evidence. An inference is a deduction which the reason of the jury makes from the facts proved, without an express declaration of law to that effect. An inference must be founded on a fact legally proved, and on such a deduction from that fact as is warranted considering the usual propensities or passions of men, the particular [206] propensities and passions of the person whose act is in question, the course of business or the course of nature.

Now, ladies and gentlemen, of course, it is charged in the first two counts that this representation was made in applications made to the State Liquor Control Board, and that necessarily or properly brings into this case some of the laws of the State of Montana which you should be informed about, and section 2815.34 of the Revised Codes of Montana provides that "Any club desiring to possess or have for sale beer under the provisions of this act shall make application to the Board for a permit so to do, accompanied by the license fee hereinafter prescribed. Upon being satisfied from such application or otherwise that such applicant is qualified as herein provided, the Board shall issue such license to such club, which license shall be at all times prominently displayed in the club premises. If the Board shall find that such applicant is not qualified, no license shall be granted and such license fee shall be returned. The Board shall have the right at any time to make an examination of the premises of

such club and to check the alcoholic content of beer being kept or sold in such club."

Section 2815.37 provides that "No club shall be granted a license to sell beer, (a) if it is a proprietary club or operated for pecuniary gain, (b) unless such club was established as such club for at least one year immediately prior to the date of its application for a license to sell beer." [207]

Section 2, Chapter 84, Laws of 1937 of Montana provides in part: " 'Club' means a national fraternal organization, except college fraternities, or an association of individuals organized for social purposes and not for profit, with a permanent membership and an existence of two years prior to making application for license with permanent quarters or rooms.

" 'Person' means every individual, co-partnership, corporation, hotel, restaurant, club and fraternal organization, and all licensed retailers of liquor, whether conducting the business singularly or collectively."

Section 3, Chapter 84, Laws of 1937 provides that "The Montana Liquor Control Board is hereby empowered, authorized and directed to issue licenses to qualified applicants as herein provided, whereby the licensee shall be authorized and permitted to sell liquor at retail, and upon the issuance of such license the licensee therein named shall be authorized to sell liquor at retail but only in accordance with the rules and regulations promulgated by the said board and the provisions of this act. Qualified applicants shall include persons, hotels, clubs, fraternal organizations and railway systems."

Section 9, Chapter 84, Laws of 1937 provides that "No person shall be granted more than one license in any year. No person, club, or fraternal organization shall be entitled to a license under this act unless such person, club, or fraternal organization shall have a beer license issued under the laws of Montana.

You notice, as I read through those statutes, ladies and gentlemen, and running through all of them is the wording that the State Board is only permitted to issue licenses to qualified applicants, not to all, but only qualified applicants.

Further, there is a limitation upon the right of the State Board to issue, and of individuals to hold, and among the qualifications that are prescribed by the legislature of the State of Montana that one must possess in order to lawfully permit the Liquor Control Board to issue a license and that individual to possess it, is found in another section of the laws of Montana which provides that no license shall be issued by the Board to a person who is not a citizen of the United States, and who has not been a citizen of the State of Montana for at least five years. That is one of the qualifications set out by the legislature, and one may not lawfully possess or own or hold or have issued to him a liquor license unless he is a citizen of the United States and has been a citizen of Montana for at least five years.

Then the question, or problem, rather, before you is to consider the evidence in the case to determine whether or not the essential allegations of the indictment have been proven, not to consider just the

testimony that was given on behalf of the government, or just the testimony given on behalf of the defendant, but all the testimony, because it is all evidence [209] in the case, and it makes no difference who produced it here, if you hear it here, it is all evidence; and, of course, ladies and gentlemen, one of your first duties will be to separate the wheat from the chaff, because it often is, and probably is in this case, that much has been said and done and spoken that has no particular bearing on the case, that serves no purpose, other than to possibly becloud something that may have a particular bearing on the case.

Now, the ultimate fact to be proven here, as charged in the indictment is this, and that simply means, as I have told you, whether or not this man made a representation that he was a citizen, whether that was false, as I defined the word to you, whether he knew it was false, and whether he did it wilfully.

It is necessary for you, of course, to examine the evidence in the case to determine that fact and the truth of the matters. You can take into consideration, for instance, you may take into consideration that the transaction out of which this prosecution arose was initiated by the defendant himself. He initiated the transaction that resulted in the prosecution by making this application to the State Liquor Control Board. He was not required to make this application; he was not required to answer any question at all, if he did not desire to do so, but for some reason and for some purpose of his own, he did make the application, and, of course, making

the application as it appears from the application and the evidence, it was [210] necessary for him to make certain statements and representations, to truthfully answer certain questions; and that was necessary because there was a limitation upon the authority of the State Liquor Control Board to issue licenses. They can only issue licenses to qualified applicants, and it is their duty as state officers to satisfy themselves before issuing a license that the applicant is qualified; and that is what they were doing here; and they have a right to do so, and to expect an honest and truthful answer will be made by the applicant to the questions asked, and that if the applicant does not know for certain the answer to a question, that the only truthful answer he can make is that he does not know, that he can't truthfully say that he does know a fact to be true, if, as a matter of fact, he does not know the fact to be true. So, as I say, the defendant initiated these proceedings. No law of the state required him to make this application. This was a voluntary act on his part.

So, you have a right to consider, ladies and gentlemen, in that regard, who the defendant is, so far as the evidence discloses; how long he has resided in this country, so far as the evidence discloses; the degree of intelligence that he has, so far as the evidence discloses; what his status in the community and in this country was during the time he was here, whether or not he was a businessman familiar with the forms and customs of business, understood business transactions, so far as the [211] evidence dis-

closes it, or whether he was someone whose lot called him into the exercise of common labor and where there would be no familiarity at all with business matters and customs on his part. You have the right to consider that. You have the right to consider, ladies and gentlemen, so far as the evidence discloses, whether or not his length of time in this country was sufficient to familiarize himself with the language that is spoken, whether or not it was a foreign language, whether or not he knew the language well enough and was of sufficient intelligence, in filling out business forms and answering questions, to choose language that would express the truth as he knew it to be, or whether or not, because of lack of education or something of that kind, he didn't know the appropriate language to use to express his thought. You have the right to consider all those things in considering what was done.

You have the right, ladies and gentlemen, and it is in evidence here uncontradicted, that he, among others, caused a corporation to be formed. You have the right to consider whether or not he knew from that what powers and authority corporations might have, whether they could own property in their own name. Now a corporation is a legal entity, separate, aside and apart from the individual stockholders; and whether or not that he knew a corporation was qualified to do business in its own name. You have the right to consider, if the evidence discloses [212] it, and while the law presumes that all of us know the law, and not, of course, holding the defendant strictly to that presumption, you have the right to

consider whether or not in making this application, and to acquaint himself with the laws of Montana, if he were in doubt, whether he procured for himself competent legal aid and competent legal advice in doing what he did.

Now, the questions here are simple. They are not hard to understand; they are couched in ordinary language that all of us understand, and there is a line where it says that the name of the applicant for this license shall be set out, should be printed, the name of the applicant. That means the name of the person applying to have the license issued to him. It couldn't have any other meaning; and over that is put L. P. De Pratu. You can consider whether he could misconstrue that in view of his 50 years residence, as his attorneys say he had, in this country and engaging in business as the evidence shows he was.

Next, the trade name which the applicant intends to call such business. That is the Stockman's Club. Now, you can consider that, because under the evidence in this case, the Stockman's Club was not a trade name. The Stockman's Club was a corporate name. That was the name of the corporation, and not a trade name. It was not any more a trade name than the name L. P. De Pratu was a trade name. Trade names are known to the law of Montana, and all a trade name is is an individual [213] operates a business under a name that does not identify himself as the owner of the business. That is not a corporation, it is not a partnership, it is the individual, and he is doing business, but he adopts what is called

a trade name. So, should I open a grocery store under the name of Brown Grocery here in Helena, that wouldn't be a trade name, because my name is Brown, my name would identify me as being the owner. But, instead of that, should I, say, open a grocery store under the name of Helena Grocery herein Helena, that would be a trade name, because that name would not identify me as being the operator or owner of the business.

Now, you may consider from the evidence and the fact that the defendant had this corporation—was one of the organizers of this corporation, whether or not he knew that the corporation was an entity separate and apart from himself. And go through these things, and go through all of these admissions that have been made here, ladies and gentlemen, and see whether or not there could be any mistake about it, or to see whether or not anyone reading this could, from the language of this application, believe that anybody else but this defendant was applying for this liquor license, and to be issued to him in his own name by the State Liquor Control Board, whether there could be any possibility of confusion about it. Read it over.

And, of course, in that connection, ladies and gentlemen, you may consider evidence that has been produced in the case on [214] behalf of the defendant himself. Now, that evidence was presented to you—you were permitted to hear it only to establish the intent with which the defendant acted at the time he acted, and, of course, the jury are just as much entitled to hear evidence that establishes

guilty intent as they are to hear evidence that establishes innocent motive, because the burden is upon the government to establish that intent, and it makes no difference whether the evidence comes from the side of the prosecution or the side of the defendant.

So, you have this situation, that the intent that you must find existed in this man is the intent that was in the defendant's mind at the time he signed these applications and caused them to be sent to the State Liquor Control Board, not some intent that was formed afterwards, but the intent he had in his mind at that time, and that is the intent that must be established here. And, if you believe beyond a reasonable doubt from the evidence in this case, that the defendant made this application in which he recited that he was a citizen, and that at that time he was not a citizen by naturalization or any other way known to the law, that he was an alien, if you believe it, and if you believe that he knew at the time he made this representation that he was a citizen of the United States he knew he was making an untruthful representation, and if you believe further that he made this representation that he was a citizen of the United States for the purpose of having the [215] State Liquor Control Board believe that he was and accept his statement as true, and, believing the statement was true, to issue him a liquor license under the laws of the State of Montana, then, if you believe those facts, the defendant is guilty as charged in count one and two, and your verdict should be guilty, because the

government has established the requisite intent, and it makes no difference, ladies and gentlemen, what his intent was—what he intended to do with the license after he got it, whether he intended to tear it up, whether he intended to give it to the Stockman's Club, or give it to somebody else or intended to use it. That is not the intent in this case you must find. That has absolutely nothing to do with it. The intent that is material here is whether or not, as I have told you, he intended to deceive the State Liquor Control Board into believing he was a citizen and thus issue a liquor license to him.

Now, as I view the evidence, ladies and gentlemen, in the case, why it seems to me from the testimony, if the testimony of the defendant's witnesses are to be believed, that there can't be any question of the intent that the State Liquor Control Board would issue this license to him. That is the way I view the evidence. However, of course, you are the sole and exclusive judges of the evidence, that is for you to say whether he did or whether he didn't, and if you don't view the evidence as I do in that regard, it is not only your right, but it [216] is your duty to disagree with me, and to return a verdict in accordance with the way you view the evidence. But it is said here in the first place, it is proven that this corporation, this club, was not a qualified applicant under the laws of the State of Montana to receive a liquor license because it hadn't been in existence two years prior to the 27th day of June, or two years prior to the 15th day of January. It was incorporated

on the 14th day of October, 1944, and it could not become a qualified applicant for a liquor license until the 14th day of October, 1946, and it is said here, as I understand the testimony, the testimony of the witness is that the Stockman's Club, although not a qualified applicant, it desired to do business, to sell liquor, and it is said here, as I understand the testimony of the defendant's witnesses themselves, that the defendant knew that, that in order to do business that he applied for a liquor license himself, and was to hold it for the two years until the Club became qualified. So, what does that lead to? There had to be a liquor license issued under the laws of the State before the Club could legally sell liquor. They had to get it through deceit on behalf of the defendant because the Club could not hold a license, and he, as an incorporator, as a director, a stockholder and part owner of the corporation with two others, desired this business to be done and to do it under any circumstances. Now, how, if it is said he thought, or if it could be said he thought that he was applying [217] for this liquor license for the Stockman's Club, how could that be maintained in one breath, when it was said he knew the State Board would not issue the license if applied for in the name of the Stockman's Club; and, of course, that testimony disclosed, as I view it, although, of course, this is for you—I am talking evidence now and it is for you—that he did know that a corporation could legally apply in its own name for a liquor license and could be issued a license if it were qualified under the laws of the

state at that time; and, of course, the question might suggest itself, that after one had gone to the trouble and expense of incorporating a corporation that could do business in its own name for the purpose of doing this business, why, if that were the case and the thing were an honest transaction, the application should be made in the name of the corporation and the license issued in the name of the corporation as the owner because the corporation would be the owner of the license.

Now, of course, you have a right to consider the statements and representations that he made prior to this time with reference to his citizenship—the writing is in evidence—to consider the Alien Registration form where he says that he was born in Canada. Having been born in Canada, that fixed his status, ladies and gentlemen, as a Canadian citizen, and, insofar as American citizenship was concerned, an alien, and there is no presumption that any alien acquires citizenship or any [218] right of citizenship because of continued long residence in the United States, there is no such presumption as that at all. So, if his statement were that he was born in Canada, and the other evidence in this case is true and believed by you, that establishes that he is a Canadian citizen and thus an alien as far as citizenship in the United States is concerned. He says "I am a subject or citizen of what country: Uncertain, but last of Canada." Now, then, you can again consider, so far as the evidence shows, his intent, and whether or not he was sufficiently acquainted with the language to

make his thoughts in that regard clear, and you may consider in that regard whether or not, where he says that his citizenship is uncertain, that is any claim that he believes himself to be an American citizen, or any expression of any thought that he believes himself to be an American citizen, and, if there is any uncertainty in the writing, you may consider the fact that the writing was made by him, and if you find that he had sufficient intelligence and knowledge of the language to choose words which would express thoughts and ideas, but, rather than doing that, he chose words that injected uncertainty into the matter, you, of course, may consider the reason, if any, you think he had for doing those things.

Now, no juror—you should not surrender, and none of you should surrender, your deliberate conscientious convictions merely at the behest of a majority of the jurors or for the [219] sake of unanimity, but so long as any juror has a reasonable doubt as to the guilt of the defendant, such juror should continue to vote not guilty, and on the other hand, so long as any juror has a conviction that the evidence has established the guilt of the defendant beyond a reasonable doubt, so long as he retains that conviction, it is his duty to vote guilty, and your duty in that respect, ladies and gentlemen, when you retire to your jury room, and you will do this, you will discuss all of the facts of the case of importance among all of you and each one of you who desires to do that has a right to do that at the proper time. You will then take a vote. If

there is a difference of opinion, it calls for further discussion, and if the difference of opinion remains, it calls for further discussion, and the matters of difference, if any, remaining should be further discussed, and the discussion should be carried on with the frame of mind "Well, maybe the other fellow is right. I am going to keep my mind open and see." In other words, you don't close your mind to the other fellow's contention. And should it come down to it, you have the right to say, "Well, is it reasonable that they are all wrong and I am right," because usually several minds are more apt to come to a just conclusion than one. But if, after you do all those things, you keep an open mind, there are these discussions, and you are not convinced by their argument, of course, it is your duty to vote your absolute conviction, whichever way it may be.

Now, ladies and gentlemen, it requires all 12 of your number to arrive at a verdict in this case, it must be your unanimous decision. When you, all 12 of you, have arrived at your verdict, the man or woman whom you have appointed as foreman of your jury when you first have gone into your jury room, will sign the verdict and you will be returned into court, and in that connection, ladies and gentlemen, you will keep in mind that each one of the counts constitutes a separate and distinct offense against the laws of the United States, and the defendant's guilt or innocence of each one of them should be determined separately and not all lumped together. Definite forms of verdict will be given to you so that if you should find the defendant

guilty on some of the counts and not guilty on some of the others, your verdict should so reflect, and if you find him guilty or not guilty on all of them, your verdict should so reflect and those forms will be given to you.

But remember this, ladies and gentlemen, insofar as the question of intent must be determined in this case, it is, as I told you, it is the intent the defendant had in applying for that license, and what he intended that the proper authorities of the State Liquor Control Board of the State of Montana would do as a result of his filing that application with regard to issuing to him in his name a license, and there is not any question of any intent that he might have as to what he would do with the license after he had got it. [221]

The case is not finally submitted to you, ladies and gentlemen. There are matters which must come before me. Step out into the hall momentarily and hold yourselves in readiness to return into Court.

(Jury retires from courtroom.)

The Court: Does the government have any objection or exception to the charge?

Mr. Pease: The government has none.

The Court: Does the defendant?

Mr. Acher: We wish to except to the Court's charge on the word "knowingly," and in addition to the offered instruction, I would like to call attention to the case of Price v. U.S., 165 U.S. 311, where it says, "Evil intent or bad purpose in doing such thing is the element."

The Court: Well, I am satisfied with the definition of the word—was it wilfully or knowingly?

Mr. Acher: It was the word knowingly.

The Court: Your exception is granted. I am satisfied with the charge.

Mr. Acher: On the word, "Falsely," we except to the charge as failing to include as a part of the significance of the word a fradulent or criminal intent.

The Court: I said the word "falsely" involved fraud.

Mr. Acher: Perhaps, I was following it and I thought—maybe my recollection is wrong. [222]

The Court: Maybe you better go ahead and take an exception.

Mr. Acher: I just want to call attention to another case, that it requires a fradulent or criminal intent, 31 Federal 68, U.S. v. Otis.

The Court: Don't you think if one deliberately misstates a fact that he knows to be untrue for the purpose of having another accept it and act on it is criminal intent if the law makes it so?

Mr. Acher: That is what we objected to, your Honor, the fact that a civil definition would not be sufficient. It is our contention—(interrupted)

The Court: It is not a civil definition, or if it is, it applies equally to the criminal law.

Mr. Acher: It is the rule followed in estoppel.

The Court: I think fraud is fraud whether it is in civil court or criminal court, and that is simply a definition of fraud.

Mr. Acher: In connection with the instructions, we except to the definition of the word "feloniously" as given in the charge, but we haven't offered an instruction based on the Montana statute.

The Court: You say there is a Montana statute?

Mr. Acher: A Montana decision, two Montana decisions.

The Court: Very well.

Mr. Acher: We except to the language of the Court that the [223] direct evidence of one witness entitled to full credit is sufficient to prove any fact in this case upon the ground that count 3 contemplates a charge of making false statements under oath, and under the authority of Fotie v. United States, 137 Federal second, 831, which distinguishes the Warszower United States Supreme Court case—(interrupted)

Court: Wasn't that a perjury case?

Mr. Acher: They said it was a false statement and I am preserving the record. That is perjury in that they said it was a false—(Interrupted)

The Court: You have preserved it sufficiently. If I considered he was charged with perjury under the third count, I would have granted the motion to dismiss, but, as I view it, there is no charge of perjury and he has not been prosecuted for perjury.

Mr. Acher: We except to the language of the Court to the effect that it is suggested that the defendant knew the club could not get a license when the application was filed.

The Court: It was your opening statement to the jury, that has been your contention all the way through. It was your opening statement to the jury that the corporation could not get a license, and the defendant knowing that made arrangements to get the license.

Mr. Acher: I understood he filed the applications for the club and they wouldn't issue it to the club, and my offers of [224] proof were designed to show that nevertheless the Board did issue it to him.

The Court: You know, as a matter of law, the Board couldn't do anything else but what it did do because the corporation was not qualified.

Mr. Davidson: May we have an exception to the language of the charge to the effect that the defendant having been born in Canada that makes him a citizen of Canada and that he is an alien?

The Court: That is true, and I limited that in my instructions to under the facts in this case, and I did that because of your argument that he said his father was an alien and that he obtained citizenship through his father's naturalization.

Mr. Davidson: For the purpose of the record we might cite section 1993 of the revised statutes.

The Court: What is that section? I don't have that section. What is that section, derivative citizenship?

Mr. Davidson: No, it is citizenship by birth.

The Court: Well, if that is the case, if there is any such contention as that, then his statement that

he obtained citizenship because of his father's naturalization in the United States was a false statement under oath.

Mr. Davidson: No, your Honor, they are consistent.

The Court: If he is born a citizen, how can he obtain citizenship through his father's naturalization, how can there be [225] any consistency?

Mr. Davidson: Because if the father was a naturalized citizen at the time of his birth, he would be a citizen of the United States, or if his father became a citizen at any time prior to the time the son was 21, if he were residing in the United States, he became a citizen.

The Court: Your theory, as I view it, all the way through is he came over here when he was under the age of 21—it is a matter of no importance, I am not going to change the charge. Call in the jury.

(Jury returns to the courtroom.)

The Court: Swear the bailiffs, Mr. Walker.

(Bailiffs sworn.)

The Court: Well, ladies and gentlemen, the case is now finally submitted to you for your consideration and decision. The first thing you will do when you retire to your jury room is to elect one of your number foreman and commence your deliberations. You will now retire in charge of the bailiffs to your jury room. The exhibits received in evidence and the indictment will be sent in to them, Mr. Walker.

In the District Court of the United States,
District of Montana

United States of America,
State of Montana—ss.

I, John J. Parker, Official Court Reporter in the District Court of the United States, District of Montana, Butte Division, do hereby certify that the foregoing annexed transcript is a true and correct record of the proceedings had in Criminal Action No. 6747, United States of America, Plaintiff, vs. Louis Raphael De Pratu, Defendant, before the Honorable R. Lewis Brown sitting with a jury, in the Federal Building at Helena, Montana, on January 7th, 8th and 9th, 1948.

/s/ JOHN J. PARKER,
Official Court Reporter. [227]

Thereafter, on February 9, 1948, the defendant filed a Statement of Points herein, being in the words and figures, following, to wit:

[Title of District Court and Cause.]

STATEMENT OF POINTS

Comes now the defendant and appellant and makes the following statement of the points on which he intends to rely on the appeal.

1. The motions for the dismissal of the three several counts of the indictment upon the ground that the same failed to charge offenses against the laws of the United States should have been granted.

2. The court erred in denying the motion of the defendant for a Bill of Particulars.

3. The motion of the defendant for orders for the entry of judgments of acquittal upon the three several counts of the indictment made at the conclusion of the government's case upon the ground that the evidence was insufficient to sustain a conviction of the defendant should have been granted.

4. The motion of the defendant for orders for the entry of judgments of acquittal upon the three several counts of the indictment made at the close of all of the evidence upon the ground that the evidence was insufficient to sustain a conviction of the defendant should have been granted.

5. The court erred in excluding the evidence contained in offers of proof numbered 1, 2, 3, 4, and 5, made while the witness, Paul W. Smith, was on the stand, and the evidence contained in [229] offer of proof No. 6 made while the witness Emma Lundby was on the stand.

6. The court erred in admitting the government's exhibits No. 5 and 6 over objections.

7. The court erred in excluding from evidence defendant's offered exhibits numbered 4, 10, 12, 17 and 18, and the portions of exhibits 11 and 15 that were excluded.

8. The court erred in the admission of testimony of the witness, Arthur Matson, over objection and in the denial of the motion to strike portions of the testimony of said witness elicited in response to interrogation by the court.

9. The court erred in failing to give the defendant's offered instructions numbered 1, 2, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 23, 24, 25 and 26, which were considered by the court before the charge to the jury was given, were marked refused and have been filed with the clerk and appear in the transcript.

10. The court erred in overruling the exceptions of counsel for the defendant to the remarks of the court in interrupting one of the counsel for defendant during the course of his argument to the jury.

11. The court erred in overruling the exceptions to the portions of the oral charge to the jury to which specific objections were made, particularly the objections to the court's definitions of the words "knowingly," "falsely" and "feloniously"; the charge that the direct evidence of one witness entitled to full credit was sufficient to prove any fact in the case; the statement of the court in which it was suggested that the opening statement of defendant's counsel and the evidence in the case disclosed that defendant knew the club could not get a license [230] when the applications were filed; the charge to the effect that the defendant having been born in Canada was therefore a citizen of Canada,

and the other objections as appear in the record for the reasons stated at the time and overruled by the court.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.

Service of the foregoing statement of points admitted and receipt of copy thereof acknowledged this 3rd day of February, 1948.

HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Feb. 9, 1948. [231]

Thereafter, on February 9, 1948, the defendant filed a Designation of the portions of the record to be incorporated in the record on appeal herein, in the words and figures following, to wit: [232]

[Title of District Court and Cause.]

DESIGNATION

Comes now the defendant and designates the portions of the record in the United States District Court to be contained in the record on appeal as follows:

The indictment on file herein; the minutes of the court upon the plea of the defendant; the notice

of motion and motion for bill of particulars; notice of motion and motion to dismiss the indictment; the minutes of the court relating to the trial of the defendant; the reporter's transcript of all of the testimony and proceedings had at the trial, including the instructions given and refused; all exhibits introduced at the trial; the verdict of the jury; the judgment of the District Court; the notice of appeal; this designation; defendant and appellant's statement of points; and the order of the court relating to the transmission of original exhibits, one to seven, inclusive, introduced or offered at the trial to the Circuit Court of Appeals.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.

Service of the foregoing designation admitted and receipt of copy thereof acknowledged this 3rd day of February, 1948.

HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Feb. 9, 1948. [233]

Thereafter, on February 18, 1948, a Stipulation was duly filed herein to incorporate in the Transcript herein, certain additional portions of the Reporter's Transcript, being in the words and figures following, to wit: [277]

In the District Court of the United States, District of Montana, Helena Division

No. 6747

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOUIS RAPHAEL DE PRATU,
Defendant.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto, acting by and through their respective counsel, that the reporter's transcript of proceedings had in the above-entitled cause heretofore filed herein may be amended by incorporating therein the transcript of all of the Voir Dire Examination of the jurors who sat as the trial jury in said cause.

Dated this 17th day of February, 1948.

CHARLES DAVIDSON,
ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.
HARLOW PEASE,
EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed February 18, 1948. [278]

Thereafter, on February 18, 1948, an Order to incorporate certain additional portions of the Reporter's Transcript in the record on appeal was filed herein, being in the words and figures following, to wit: [279]

[Title of District Court and Cause.]

ORDER

Pursuant to the stipulation of counsel filed herein and it appearing a proper case therefore:

It Is Hereby Ordered that the transcript of proceedings, had at the trial of the above-entitled cause filed herein by the official court reporter may be supplemented by incorporation therein of the transcript of all of the Voir Dire Examination of the jurors who sat as the trial jury in the above-entitled cause which has likewise been prepared and certified to by John J. Parker, official court reporter.

Dated this 17th day of February, 1948.

R. LEWIS BROWN,
United States District Judge.

[Endorsed]: Filed February 18, 1948. [280]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing three volumes consisting of 280 pages, numbered consecutively from 1 to 280, inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 6747, United States of America vs. Louis Raphael De Pratu, required to be incorporated therein by designation of appellant, as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, the following original exhibits introduced or offered at the trial of said cause, to wit: exhibits Nos. 1, 2, 3, 4, 5, 6, and 7.

I further certify that the costs of said transcript amount to the sum of Thirty-two and 90/100 Dollars ($32.90) and have been paid by the appellant.

Witness my hand and the seal of said Court at Helena, Montana, this 18th day of February, A.D. 1948.

[Seal] /s/ H. H. WALKER,
Clerk, U. S. District Court,
District of Montana. [281]

[Endorsed]: No. 11842. United States Circuit Court of Appeals for the Ninth Circuit. Louis Raphael De Pratu, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed February 21, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11842

UNITED STATES OF AMERICA,
Plaintiff and Respondent,

vs.

LOUIS RAPHAEL DE PRATU,
Defendant and Appellant.

ADOPTION OF STATEMENT OF POINTS

Comes now the defendant and appellant and adopts the statement of points upon which he intends to rely on the appeal which was heretofore filed in the district court of the United States in

and for the District of Montana and appears as a part of the transcript of record.

/s/ CHARLES DAVIDSON,
/s/ ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.

Service of the foregoing adoption of statement of points admitted and receipt of copy acknowledged this 19th day of February, 1948.

/s/ HARLOW PEASE,
/s/ EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Feb. 24, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE PORTIONS OF THE RECORD TO BE PRINTED

Comes now the defendant and appellant and designates the following portions of the record which he desires to have printed, to wit: The entire record including the exhibits that were introduced or offered at the trial of the above entitled cause save and except certain exhibits and portions of exhibits and certain statements of counsel and of the Court in connection therewith, as follows:

1. That, if possible, photostatic copies of plaintiff's exhibits 1 and 2, defendant's exhibits 3 and 4, and plaintiff's exhibit 5 be incorporated in the printed record rather than printed copies thereof.

2. That only portions of plaintiff's offered Exhibit 7 be printed, as follows: namely the certificate appearing at the front of the instrument; that portion of page 1 consisting of the title of the proceedings and including the manifest data read to applicant, in other words, down to and including the words "but that otherwise, the orchestra would be willing to play for expenses," and all that portion of page 10 of said exhibit from the top of the page down to and including the 9th answer given and shown upon said page 10.
3. That the matter appearing from and including line 20, page 3, to and including line 6, page 10, be omitted.
4. That the matter commencing with the words "I don't intend" page 10, line 9, to and including line 10, page 14, be omitted.
5. That following the statement appearing at line 15, page 14 "(Thereupon, after a jury was drawn and sworn, the following proceedings were had:)," the voir dire examination of the 12 jurors who sat as a trial jury in said action be printed.
6. That the opening statement of counsel for the plaintiff commencing at line 19, page 14, to and including line 13, page 18, be omitted and that a statement be inserted in lieu thereof "Thereupon Mr. Pease made the opening statement for the Government:"

7. That the matter appearing from and including line 15, page 47, to and including line 1, page 51, be omitted.

/s/ CHARLES DAVIDSON,
/s/ ARTHUR P. ACHER,
Attorneys for Defendant and Appellant.

Service of the foregoing designation admitted and receipt of copy thereof acknowledged this 19th day of February, 1948.

/s/ HARLOW PEASE,
/s/ EMMETT C. ANGLAND,
Attorneys for Plaintiff and Respondent.

[Endorsed]: Filed Feb. 24, 1948.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Now comes the Appellee, pursuant to and within the time allowed by rule 75 of procedure, and designates the following portions of the record to be printed, which have not been designated by the appellant, to wit:

1. That there be included in the record all of the matter beginning with line 7 on page 10 to and including line 17 on page 12 of the transcript.

2. Appellee objects to the inclusion in the record of any part of the appellee's proposed Exhibit 7 except those parts offered in evidence as appears in the matter from line 24 of page 62 to and including line 8 of page 63 (to which offer the Court sustained an objection on behalf of the appellant.) (Record page 72, lines 2 and 3.) And specifically objects to the inclusion in the record of that portion of said proposed Exhibit 7 immediately following the words, "determine admissibility," and commencing with the words, "Chairman to Applicant," down to and including the words, "would be willing to pay for expenses;" on the ground that said portion last mentioned was never offered in evidence, either by the government or the defendant, and forms no basis for the ruling of the Court; further that the only ruling of the Court upon said Exhibit was a ruling in favor of the appellant.

/s/ JOHN B. TANSIL,
United States Attorney for the District of Montana.

/s/ HARLOW PEASE,
Ass't. United States Attorney for the District of Montana.

/s/ EMMETT C. ANGLAND,
Ass't. United States Attorney for the District of Montana.

[Endorsed]: Filed March 1, 1948.